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THE MANUFACTURE OF HISTORICAL MATERIAL

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THE MANUFACTURE OF HISTORICAL MATERIAL

An Elementary Study in the Sources of Story

BY

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Two ideals float before the minds of men in our own day. The first ideal is the future of the human race in this world; the second the future of the individual in another. The first is the more perfect realisation of our own present life; the second the abnegation of it. Both of them have been and are powerful motives of action; there are a few in whom they have taken the place of all earthly interest.

LONDON

WILLIAMS AND NORGATE

14 HENRIETTA STREET, COVENT GARDEN, W.C.

1916

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PREFACE

In a former work, *The First Twelve Centuries of British Story*, published in 1912, a narrative sketch was attempted of the early history of the British Islands as a whole, carrying the story down to the date of the accession of Henry II. in 1154. An introductory chapter dealt with the records of the times for all parts.

In that volume, a review of the social side of history, the laws and customs and land usages of the societies, was as far as possible avoided, for many reasons, of which the most urgent was that such a subject called for a scrutiny of a different set of authorities from those in use for narrative history, records dealing with ancient custom and social life, of which the part treating of the tribal and pastoral societies of the West had been but little touched, apart from antiquarian inquiry.

A great part of the subject-matter of this book was originally intended, like the preliminary chapter of the former book, to be an introduction to a work in progress dealing with feudal and communal societies.

But as the chapter grew under the hand,

the consideration of the successive phases of historical research possessed so much interest as a special subject in itself, and applied so equally to all authorities for history, that it seemed to be worth something better than to be treated as a mere bibliography, and to be fit for publication as a separate work.

This preliminary matter is touched upon that it may be understood that, although I have from time to time expressed strong personal opinions in this book, no part of it was written in view of any such opinions, or with any other purpose than to put forward the necessary processes through which all the material has to pass before it is placed before us as a history, and to impress the dangers which meet us in handling it, and the care which must be exercised in accepting conclusions. One cannot read through a great mass of mediæval literature without forming some strong views. Where it has been thought necessary to criticise others, I have tried to pick out someone worth criticism, and I hope that it has been done in a reverent manner.

I have taken great pains in reading and re-reading the authorities quoted, but the want of knowledge of the ancient languages in which they are embedded, is a serious drawback, and there is always great uncertainty how far the translation, where there is one, represents either the spirit or the letter of the original.

In deference to the opinion of a very learned friend who adjudged that my *First Twelve Centuries* would have had greater value if more frequent references had been given to the authorities on which I relied, many such references are given here. It is doubtful whether this mass of reference is of much value for the general reader. It is never safe to use one without verifying it. A reference may sometimes be only a particular instance in support of conclusions reached by diffuse reading which cannot be more effectually put before the reader; sometimes it may be misleading as giving authority to a single instance not supported by others; sometimes it may not bear out the text; it is not infrequent not to find it at all. But it saves a reader the trouble of inquiring or thinking for himself, or of exercising any mental responsibility, and it may have this further advantage, that in looking up the reference the reader may be led further afield and may find something of value.

I have a sincere hope that this book may be of interest to persons engaged, whether as teachers or pupils, in historical studies. But the audience to whom it is especially addressed is that large class of professional and business men who seldom have any opportunity of reviewing or correcting their early impressions of historical facts, though they may be helping to make history themselves on the strength of what they have been taught at school.

Brought up on seventeenth-century interpolations of fiction, such as Alfred and the cakes, and rarely getting further in English history than Henry's six wives and Charles's head, it must come as somewhat of a shock to find the men of Connaught and Moray and Brecon fighting side by side with the "Anglo-Saxon" in defence of a common country.

It is impossible to believe that, for an Imperial people possessing territory all over the world, lands which have been colonised and occupied and have to be defended by settlers from every part of these islands, any history of the past can be satisfying which treats only of one part, and that often in the spirit of aggressive bitterness towards the people of another. I would urge as of the utmost importance that, whether we affect a true judgment in past events or view their bearing on our own conditions, we should regard them from the standpoint of habitants or translated saints of the whole islands, and not as jealous advocates of any one locality.

I gratefully acknowledge help from several kind friends.

J. W. JEUDWINE.

July 28, 1916.

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aut sola voluntate facere potuerit. De qua quæstione," continues Anselm, "non solum literati, sed etiam illiterati multi quærunt et rationem ejus desiderant." He explains in his preface that he has been obliged unduly to hurry the work, because before he had finished it the irresponsible copyists "me nesciente sibi transcribebant." 253.

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THE MANUFACTURE OF HISTORICAL MATERIAL

PART I

CHAPTER I

INTRODUCTORY. THE FIRST WRITTEN RECORD

THERE is danger, which every compiler of historical material must recognise, that in recording events which have taken place in remote periods, the ideas and ideals of his own time may be imported into his account of the past; the condition of a stationary society may be judged by the ideas of one which considers restless motion as progress: the morality of actions for which no motive is apparent on the surface may be condemned or approved according to a standard of moral sense which did not exist when the acts were committed: the society may even be falsely judged as backward for its neglect of precautions against physical disease which appeal to the compiler's age as a test of human advancement; or its leaders may be condemned for

leisurely movement and consequent failure to meet unforeseen contingencies if the compiler neglects to make sufficient allowances for the difference of mechanical appliances in the two periods.

These dangers are intensified when the compiler, as so often happens, relies for his facts, or even worse for the motives of action of the men of past ages, on writers not contemporary, living between his times and the times of which he treats. Here he is liable to a double danger; he may not only misconceive the times of which he writes through judging them by the conditions of his own time, but he may gauge both facts and motives in a remote past by the habits of thought and possibly the differences of language of an intermediate age with which neither he nor the people of whom he writes may have any sympathy of historical view.

There is only one way in which this difficulty can be met and checked. The compiler will seek for original contemporary written records, and if they can be found he will try to put himself as far as possible, in respect of political, theological, social, and commercial conditions, and in respect of the moral and social ideals of the age, in the position of the men who related the events which occurred in their time.

It is very questionable if any such original contemporary written record exists. We have no originals of any of the great creative works of ancient times, of Homer or of Aristotle or

of the book of Genesis, nor have we, with the rarest exceptions, original MSS. of the first-hand authorities for compiling historical facts. For instance, it is generally admitted that the MSS. which we possess of the Saxon Chronicle are copies, either wholly or in some instances not contemporary, of an original which has perished. Nevertheless, wherever it is possible the compiler should go back to the contemporary record. If he cannot find that, he should trace up the stream to the sometimes unsafe bog which may mark the source.

When this has been achieved he will inquire under what conditions the record was written; what opportunities of first-hand knowledge of the events related or the characters painted were open to the early historian; how far he was, like all of us, liable to be carried away by violent prejudice or class animosity to distort, perhaps not intentionally, the facts of the story.

History, which is not partial, is impossible; nay more, it is very dangerous. If a historian, ancient or modern, makes protest of impartiality, you will be wise to distrust his conclusions and statements of facts; but where two accounts of the same matters are written by two men who do not disguise their opinions, such as Froude and Freeman, you may regard both as able advocates stating their case, and may pass judgment upon them without the bias of either.

The Value of Language.—Then the compiler

will have to balance in his mind the language used by the writer, how far it expresses actual fact or genuine emotion and how far mere essence of exaggeration, waste of extravagant verbiage, just as now we look for some stronger and more meaningless phrase than awful, frightful, amazing, ghastly, astounding, impossible, sickening, or rotten, to express some very ordinary event, or epoch-making of some very dull and dubious speech. Even now probably a reporter might use the word extorsit if the Chancellor of the Exchequer required him to pay a heavy income tax.

Then the compiler will remember that the monk who wrote down the records (for they were all or nearly all written in the safety and retirement of the monastery) was writing, apart from those things which concerned his order, which were the most part of his history, of matters which were exceptional and out of the general order of things, that he was always on the look-out for such exceptional things, scenes of violence, acts of kings and rulers which were contrary to the Church's canon of morality or conflicted with her interests, miracles and any unusual occurrences which could give the interest of liveliness and reality to a dull and secluded world. And he was not above making them up if he did not find them.

Besides all this, the monk lived in a world of unreality, in which the first explanation of an unusual occurrence was that it was pro-

duced by the abnormal activities of an unseen world.

Unless the compiler takes count of all these matters to be weighed and considered before he accepts the statement of the monastery, he may describe for us a stationary society as being in a state almost of dissolution by not allowing for the licence of language or the prejudice of position of the early writer.

But when he has considered all these matters, if he should decide, as in almost all cases he will, that the man who wrote the matter down did not witness the acts he recorded, or wrote from an imperfect acquaintance with the characters he described, he will then ask himself, Where and from whom did the writer first hear the story? and he will ask with increased anxiety, if he can find out the verbal source, all the same questions as to prejudice and exaggeration and first-hand knowledge as have been indicated above as necessary to be asked of the MS. which appears to be the original source; and that brings me to the beginning of my book.

It is proposed here to trace, for a short period of British story only, some phases of the manufacture of the history both of law and politics and social life from our earliest means of knowledge to the finished work, through all the processes of the reduction of the first tale to writing, its editing and re-editing at various hands, its enlargement, translation, correction, critical commentary

and revision, and its final appearance as the history.

We live in a critical age when such a subject may not appeal to the learned professors of history. But if only the general casual reader of law and history could be roused to a sense of critical examination of the so-called authorities for history which are put before him, and could learn to use his common sense and powers of mental observation, it would be something gained. At present he is only too often like Charles Lamb's True Caledonian, "the twilight of dubiety never falls on him." Any absurd and apocryphal and improbable story told by an anonymous monk is sufficient to rouse him to a sense of most righteous historical indignation, if it has only been copied for a sufficient number of times from book to book, without any examination into the circumstances under which and the person by whom the story was first told.

If the student could only put before himself the many processes through which historical facts have to pass before they can be presented in the complete form of the history of Peter Parley or Edward Gibbon, he would surely take more pains to use his common sense for the examination of sources. At present the condition of historical science is a hindrance to educational methods and a danger to political life.

CHAPTER II

ORAL TRADITION

It is extremely unlikely that the earliest MS. to be found would be anything but a late copy. There is hardly a single monastic record of which we can say that the existing MS. is an original, and in many cases it is separated by centuries from the date of the supposed writer. But original or copy, when we have found the earliest written record, it behoves us to ask the further question, Where did the scribe hear the rumour which he put in writing? Who first told the story?

The Sources of Story.—All story, ancient, mediæval, or modern, rests in the first instance on oral tradition. In dealing with early monastic records, written in many cases a long time after, by men sedentary and aloof from the action recorded, we are inclined to forget this undoubted fact, and in consequence to attribute far too great an authority to the writing.

We are in this respect at the present in a position very little removed from that of the recorders of events in times past. Every story, whether it is an account of rumours current of action on a long battle-line, collected by Eyewitness or other special correspondent at the Front from the men who saw and took part in the struggle, or from other

men who saw other men who saw it, or the provisions of a treaty the final result of many verbal conferences liable to be upset by secret unwritten agreements, or the suggestion passed into law after long debate in Parliament, has in almost every instance a verbal origin.

Sometimes it is very difficult to trace it. The rumour, like the entries which the bishop of St Asaph wished Giraldus to accept as final authority because he, the bishop, had written them down in his own book, acquires a certain sanctity as undoubted fact from the reduction into writing, owing to our dependence on writing rather than on memory, and this though the written language may give no clue to the conditions attending the conflict, the minute causes which resulted in the written treaty, or the compromise which modified the law.

News Ancient and Modern.—The sources of story were the same then as now. Just as at the present day, the monk dealt with the actual undoubted fact, brought to him by a reliable informant and witness, or recorded in parchment by some former writer who had heard the story from the lips of some traveller —fact which eventually, so far as it is allowed to be told, will become history; he had secondly what is called news, the current rumour which is circulated from hour to hour only to be immediately contradicted.

But there are two points of difference.

The first is a small one, the very limited area affected, and the very deliberate circulation of news in early days.

Owing to the mechanical appliances which have bound the world together, the slight rumours circulating many thousands of miles away may be repeated in these islands within a few hours of their first circulation, and may be re-repeated every few hours with some petty difference of words. We have a 2.30 and a 5.30 edition of the same facts.

The people of past times were not so idle-minded. Very few people indeed, and those for the most part hidden away in monasteries, were concerned to hear or read the monks' editions of things long past which happened in a confined, near-by district, the re-editing by Hoveden of Simeon of Durham, or by William of Malmesbury of the Saxon Chronicle—a fact which it is well to keep in mind when any of these secluded and partial chroniclers are spoken of as representing the "public opinion" of the age.

The second was a very large and most important difference affecting very essentially all historical proportion, that the interval of time between the circulation of the report and its reduction into writing might be of enormous length. This was due to a truth which it is hard for us, who have come to rely so entirely on the note-book, to realise, namely, the extraordinary powers of the trained memory to hand down through many genera-

tions with very great accuracy accounts of events long past or pedigrees showing the descent of eminent persons or declarations of customs made long ago.

Where a society was stationary, as all early European society continued to be until touched by Rome (it is one version of the story of the Sleeping Beauty), written records were unnecessary unless to record the exceptions to the general customs of society which were known to all and held in memory by all. As constitutional history had not been invented, there was no necessity for putting political glosses on past events; the pedigree which decided a man's place in society could be as well held in the memory as reduced to writing.

Society based on Kinship.—All ancient society was based on kinship; a man's title to the privileges common to the community, the use of the common land, and the protection against violence afforded by the money compensation to be paid by the group family, depended upon his being able to give proof by pedigree of his place as a member of the community.

These pedigrees were handed down from one generation to another, committed to memory by a privileged caste, who were poets, lawyers, and historians, and in the first instance priests. Holding in their memories the pedigrees tracing back through long ages the rights of the most prominent men to a place in the community, they early acquire an immense

mysterious authority drawn from the use of technical and often unintelligible language.

In Rajputana, Sir Henry Maine tells us, "literature still retains that which we may believe to have been its most ancient form—in the songs of the hereditary bard celebrating the exploits and above all the antiquity of the family of which he is the honoured retainer." I can claim to be excused any unintentional irreverence for the Old Testament if I suggest that the first nine chapters of the first book of Chronicles were most certainly a reduction into writing of pedigrees handed down through long ages by oral tradition in this fashion.

As a single example of the history contained in oral pedigree in these islands: at the coronation of the child Alexander III., as he sat on the stone of Scone brought from Egypt by Scota, the daughter of Pharaoh, a Scoto-Irish skald from the West came forward and falling on his knees before the boy recited, no doubt in rhythmic verse, the pedigree of the young king from his remotest ancestors, possibly to Scota herself.

It was a small matter that, as the king's pedigree peered back into antiquity, gods and heroes and ordinary men show beside each other; its very portentous length gave it the greater power, and it was, in spite of the monastic advances in south-eastern Scotland, the king's title to his throne in the greater part of his dominions.

His title to be king and chief rested on

his supposed kinship to the people he ruled, and not on any territorial requirements; *teste* Bailie M'Wheeble, that "from the maist ancient times of record, the lawless thieves, limmers and broken men of the Highlands [including no doubt many of Alexander's ancestors] had been in fellowship together by reason of their surnames, for the committing of divers thefts, reifs and herships upon the honest men of the low country—all which was directly prohibited in divers parts of the Statute Book."

All ancient society rested on such kinship; the Roman missionary, a stranger, coming from a far country, and bringing with him a new religion founded on a written record, breaks through the foundations of kinsmanship; at first the break is small, the little rift within the lute; the written record, in the first instance a record only of matters of exception affecting the monk-missionary and his church, runs on for centuries side by side with the oral tradition which records the original customs. But they are written and told by different men, and are concerned with different aspects of society.

In treating both of oral tradition and of written record we shall have to keep two things separate, the records of the common customs which afterwards harden into law, and the records of events which become the tribal or national history. The monk who preached to the Saxons or the Irish or the

Franks could not be expected to hold in mind their barbarous customs ; they are by mutual consent modified and reduced into writing. But the record of events, the subject not of law but of story, often the attractive story of adventure, the Iliad or the Odyssey of tribal history, follows no such rule of reduction ; it is written by the monk (very very occasionally by the layman) so far as it concerns the affairs of the church and, by implication, of those who may hurt or benefit the church, and at the same time it is told as a spoken tale generally in verse or rhythm by the man whose business it is to tell stories.

CHAPTER III

THE POET-LAWYER HISTORIAN

The Poet Historian.—The member of the caste, for it must very soon have become an hereditary caste, who carried down the oral tradition, who counted in his memory the successive steps of the pedigree from the god-like hero, mending as he went up the broken rungs of the ladder, who stamped by his authority of recollection the character of sacred inspiration on the customs whose origin was lost in antiquity, who dwelt with the fire of poetic imagination, his eye with the fine frenzy

rolling, on the great deeds of his patron's kinsmen in the past, was in the first place a poet.

Long study no doubt, and the influence of hereditary taste and training, would strengthen the memory of the Brehon. But beyond this the help of rhythm, of musical sound, of polished verse, was called in, in all the literatures of all the nations of which we have knowledge, to make endure in the mind of the bard the doubtful wanderings of the law, the uncertain event of the battle, the remote birth and origin of the race.

For the British islands our chief source of this exemplar of history and law is to be found in the poetry of the Celtic or Scandinavian bard. It had nothing whatever in common with the doggerel, whose hall-mark is false quantity, which comes from the Roman monastery. The skald spoke in a poetic form which has been practically lost to us by non-user, poetry full of metaphor, of recondite fancies, fancies which might break through language and escape, metaphors of men who lived among the elements and likened hand-made things to the created things of the air and sea, a poetry which called for close collaboration of mind and ear.

The monastic verse was satisfied if the two lines ended with a similar sound to the ear though foreign to the eye; the skald's rhythms were governed by the most complicated abstruse rules of alliteration, of accent, of syllabic length,

of repetition of letters, besides the endless figurative metaphor of not calling a spade a spade, tedious no doubt to us lazy moderns, but highly strengthening both to the mind and memory and ear of men of past times. We have so attuned our ears to the safe splicing of similar sounds that all power of making poetry by a conjunction of ear and brain has nearly passed from us. Rhyme has destroyed rhythm.

Wherever we find, and we find in all ancient records, verse embodied in the monastic prose, we may be quite sure that for a very long time before the monastic record was reduced to writing, the event or the custom had been recorded and handed down in the rhythmic verse of the bard. It is a sign of age or of editing by one acquainted with the old oral records to find such poetry. For example, ask yourselves by whom and when the battle of Brunanburg (Saxon Chron. 937) was sung, and how long it would be before the account revised and re-edited was incorporated in the form in which it now comes down to us in the annals of several monasteries under the same date in the same words.

In Scandinavia.—The Scandinavian Sagas give us a succession of stories of adventure and social life, framed admittedly on the songs of skalds who lived and took part in the events recorded, skalds, generally very prominent fighters, whose names are given by the men who wrote down the compilations.

Throughout the Heimskringla the skald sings and records the events of the battle as he draws his bowstring; in the Icelandic Sagas the heroes declare the events in verse; the bard sang of what he saw. The bards and skalds neither considered nor treated of moral issues; the monk wrote from the moral standpoint.

A good example of such a fighting skald is Egil Skallagrimmson,[1] a reckless, unprincipled, unattached fighter, ready to shed anyone's blood for an employer who would pay, but a man who praised in verse the prowess of his enemy while he split his skull. From him can be learnt, amid his diffuse praise of the men who hit hard and often, some very interesting particulars of the British history of his time.

In England and Wales.—It is not Scandinavia alone by any means which gives us these examples of the poet. The events of the Saxon Chronicle under the years 937 (just before which it appears to have fallen under Scandinavian influence), 941, 958, 973–5, 979, 1011, 1036, 1057, 1065, and probably in passages in 1067 and 1087, are expressed in this skaldic verse. How long was it before the oral tradition found its way into the imperfect MSS. from which our history is constructed? Take any one of these poetical rhapsodies and ask yourselves how long a

[1] Saga translated by Rev. W. C. Green. Elliot Stock, 1893.

time must be allowed before the skald's song in the heat of battle has travelled so far from the spot and has been so reduced by editing and re-editing that it can be deposited as part of an identical MS. in different monasteries in which we find it as copies of a lost original. We find such a skald, one Gunlaug Ormstunge, staying with Ethelred and singing his praises after the so-called massacre of St Brice.

The Welsh Laws (*A.L.W.*, Anom. XIII. ii. 60, 61) relating the three privileged sessions according to the privilege of the country and kindred of the Cymry say that the session of the bards is the most ancient in its origin from which all sciences emanate. It claims that the session of the bards of the Isle of Britain rests upon reason, nature and cogency, or circumstance. After enumerating at some length the various offices of the bards as poets, as lawyers, and as historians, "to preserve memorial and record of everything commendable respecting individuals and kindred," etc., the law concludes: "therefore the bards are authorised teachers of the country and kindred of the Cymry." (Also *A.L.W.*, Dim. I. xxvi. 24, and Gwent I. xix. 1–2.)

Nor is it in the islands only that we find the poet-lawyer historian. The British Islands were so overwhelmed at the end of the tenth century by the Scandinavian that it would not be fair to take British examples only as examples of the skaldic poetry. France

and Aquitaine were equally the homes of the bard. Taillefer rides in the van at Hastings, juggling with his sword and singing the song of Roland, one of the great epics of the Charlemagne cycle of Northern France.

Southern France, where the transition literature from the decay of Latin was earliest and most splendid, was the especial home of the poet historian. Eleanor, the great queen, the wife first of Louis of France and then of Henry of England, coming from a race of poetic rulers, presided in her youth over the courts in which the Trouvères or Troubadours of the South competed in song.

Here every great noble excelled in verse as much as in arms. To be a poet, to sing of love or war, was simply the attribute of a gentleman. Richard, Eleanor's son, was a noted troubadour, as her grandfather William had been. The nobles of Aquitaine carried their poems and their sarcasms into politics; Bertrand de Born, a powerful noble and noted poet, lord of a castle and district in Perigord, plays a most conspicuous part in the quarrels between Henry II. and his sons, fomenting by his satire the disputes between them. Dante puts him in Hell (canto 28) and makes him compare his political infamy to that of Ahithophel making mischief between David and Absalom.

When the infamy of the Albigensian perse-

cution destroyed the nobles, the great literature died.

If there were really any hope of the British Government encouraging the study of history, a grant in aid of the study of the literature of Southern France in the twelfth century might reveal many valuable passages of English history.

In Ireland.—The verses of the skald very soon disappear in England under Roman monastic influence, and poetry, with the exception of Chaucer, is absent until the great outburst of Elizabeth's time. But the poet-lawyer historian has a long and most eventful history in Ireland from the earliest times. The Crithgabhlach (*A.L. Irel.*, iv. 357) enumerates seven degrees of poets.

The amount of Irish literary matter in antique poetical form available in MS. untranslated and unedited in the libraries of Dublin and elsewhere for political and legal history is, I understand, very great. Burke long ago saw the necessity of making use of this material, and in a letter in 1783 to General Vallancey, quoted in the Preface to the Book of Leinster, urges the translation of the ancient Chronicles in verse and prose upon which the Irish histories which precede official records are founded. "I do not see," he says, "why the Psalter of Cashel should not be printed as well as Robert of Gloster" (R.S. No. 86).

In the early times the caste are said to

have claimed so much free billeting in return for their poetry and their assertion of supremacy in law and history that it was proposed to abolish them. But St Columba, who was more or less of a bard himself, and a good fighting man, arranged a compromise of rights between the poets and the Feini.

But it is not as literary creator or as fighting man that we see the bard or skald in Ireland. He becomes, perhaps unfortunately for Ireland, merged in the lawyer, the Brehon, and the Brehon law became opposed to and irreconcilable with the English feudal law, so that instead of dying out as in Scandinavia, or becoming that ridiculous survival the Poet Laureate as in England, he remained a prominent political figure, carrying down archaic and adverse customs into an unsympathetic age, banned by the Anglo-Scottish Government.

The Statutes of Kilkenny tried ineffectually to sweep him away, declaring penalties by chapter 15 against pipers, story-tellers, babblers, rimers, mowers, or any other Irish agent. But he still remained.

Spenser, who sees in them a great power of offence against the feudal innovations, speaks of them as "a certain kind of people called bards, which are to them instead of poets, whose profession is to set forth the praises or dispraises of men in their poems or rhymes." (Not knowing the Irish language, he assumed that they depended on rhymes.) "The which

are had in so high regard and estimation amongst them that none dare displease them for fear to run into reproach through their offence, and to be made infamous in the mouths of all men." He has caused some of these poems to be translated for him: "and surely they savoured of sweet wit and good invention, but skilled not of the goodly ornaments of poetry; yet were they sprinkled with some pretty flowers of their natural device which gave good grace and comeliness unto them," for which in those days of artificial verse we ought to be truly thankful.[1]

The criticism of the bards as makers of satire is fully borne out by the MSS. of the Irish Laws. It is much more likely that their powers of satire led to the revolt against their predominance in Columba's time than any excess of billeting. Ancient society did not mind providing the poet with beer or onions, but it was remarkably thin-skinned about slander, as personal defects were a most serious danger in the social life, and an unhappy nick-

[1] "Who ever gave more honourable prize
To the sweet Muse than did the martiall crew,
That their brave deeds she might immortalize
In her shrill tromp and sound their praises dew?
. . . . . .
Sith then each where thou hast dispredd thy fame
Love him that hath eternized your name."

A hasty critic might assume that this was an effusion by one of the "certain kind of people called bards." But it is a sonnet by Spenser to Sir John Norris, Lord President of Munster.

name might lead to a chief having to go to a monastery.[1]

The poet-lawyer historian as historian has an equally long descent in all parts not dominated by the Roman monastery. Though by the end of the twelfth century the subjects of song, both historical and social, on which the bard had exercised his memory and genius, were being written down in the form of Sagas and Annals, such writings and their readers were almost entirely confined to the monastery, and the poet-lawyer historian still continued to be the recorder of events for the very large majority who did not read, carrying down his history in song from generation to generation, until it is merged in the slightness of our ballad literature. For the men who made the Sagas and Annals, the men who sang, continued to provide the oral material, until the mass of written matter enabled the writer to copy from a former written record. Even then in places more remote poetry played a considerable part.

[1] Among the stays on proceedings in distress the law (*A.L. Irel.*, i. 157) enumerates distress "for the crime of thy tongue," glossed as satire, slander or betrayal or false evidence or false witness; 175, 185, for satirising after death; 187, for satire unascertained as to kind, for a nickname; iii. 93 classifies the forms of satire as "speckled eitged"; v. 229 (The Heptads) enumerates seven degrees of satire, beginning with "a nickname which clings," and ending with "a satire which is written by a bard who is far away and which is recited."

William de Braose in 9 John paid 300 cows, 30 bulls and 10 mares *pro habenda loquela.*

The ballad literature containing much history which we owe to the northern skalds, in itself no mean thing, is small by the side of the great epics from which it is descended; like every form of literary work in turn "on meurt épicier"; but in it is contained the origins not only of our literary and historical records, but of our laws.

There is much truth in the famous saying of Fletcher of Saltoun that he "knew a very wise man who believed that if a man were permitted to make all the ballads, he need not care who should make the laws of a nation."

The ballads, though the age of Fletcher had completely lost sight of it, were the origin and epitome not only of history but of the laws themselves.

CHAPTER IV

THE POET-LAWYER HISTORIAN

The Poet Lawyer.—At the present day, in spite of the continued outpouring of acts, by-laws, regulations, and rules by all sorts of authorities set over the people, the law thus made being sometimes only for temporary use, sometimes inoperative, and not infrequently foolish, sometimes only operative by reference to legislation of times long

gone by and conditions which no longer exist (as when a London magistrate felt himself lately compelled to fine a man at the instance of a policeman for crying muffins in the street on Sunday)—in spite of all this we are all supposed to know our liabilities under the law, even under police regulations which for the most part are unwritten law. Much more was this the case when there were few laws, and those unwritten, and made not by a variety of officials or official bodies, but publicly declared by the general consent of the people who were to be bound by them.

But it could not be supposed that the interpretation of the laws would be left in early times to the people concerned, as our laws, especially police regulations, are left to be construed by the police at the present day. From the earliest times of historical knowledge there is a caste of men whose business it is to store up the laws in their memory, and to interpret them, and to apply them to the given case.

As I have pointed out, the poet-lawyer historian is the creator and preserver of a vast mass of poetical literature, whether in the Orkneys, in Ireland, in England, or in Aquitaine; he is the original authority for the Chronicles and the Annals, and the Sagas and Master Wace's *Roman de Rou*; but beyond this and above all he is especially the lawyer who declares the customs under which the people live, develops them in his memory and

interprets them. The caste meets us everywhere and at every time in story, from the men who declared the customs in India hundreds or possibly thousands of years before the laws of Manu were compiled, to the days when Deborah sat under a palm tree in Mount Ephraim, or when the deemster declared the laws of Man in the assembly of the Tynwald.

The Use of Technical Language.—All men in those days had long memories. The Brehon, as the poet-lawyer historian was called in Ireland, did not trust to memory alone, but strengthened it, and with it his influence with the unlearned, by the use of obscure technical terms not generally intelligible to the common man.

Just as the physician of to-day, not being paid by the length, writes his prescription shortly in a dead language and puts, or did put until recently, the sign of the planet Jupiter at the head of it in order that you may not know how much *aqua distillata* he is giving you, so the Brehon of times past, who might also be the physician as well as the parson and lawyer, not only declared the law as its authorised exponent, but declared it in technical expressions of which he only fully understood the meaning. As the years passed on, as the customs became archaic, their use and origin forgotten, the terms which had been used to describe them a strained philological hand-clasp across the centuries, the Brehon "put a fine thread of poetry about

them" (*A.L. Irel.*, iii. 89), enhancing their professional secrecy, and often ending, if we may judge by the commentary in the Brehon laws, by himself forgetting the meaning of the expressions in which they were wrapped.

A fine example of the refinements to which the early unwritten law had attained in the hands of the Brehon in the communal society, and of the jealousy with which the lawyer regarded his official secrets, an example also of the change coming over a community when land as the basis of society took the place of cattle, occurs in the famous account of the great lawsuit at the Thing in the Nial's Saga (p. 280, edition 1900).

The defendant takes exception to the men of the inquest that they were not householders. The answer is given that they have dairy stock to the value of the qualification in land, which is the same thing. The defendants appeal to Skapti, the speaker of the law, and he sends back word that it was surely good law though few knew it. The defendants then take another objection that four of the inquest were wrongly summoned; "for those sit now at home who were nearer neighbours to the spot." To this the plaintiffs reply that the greater part of the inquest was rightly summoned, which was sufficient. Appeal is again made to the lawman Skapti, who evidently does not at all like this growing knowledge of the secrets of the law. "More men are great lawyers now," he said, "than I

thought. I must tell thee then that this is such good law in all points that there is not a word to be said against it; but still I thought that I alone would know this now that Nial was dead, for he was the only man I ever knew who knew it."

Bereford, when a somewhat similar objection as to a majority of jurors being insufficient is urged before him in a case in *Y.B. Edw. II.*, remarks sarcastically, "Much good would it do you if they were all here." Trial by jury had not then hardened into its present form of absolute unity.

A further technical defence, which was more effective, is met with a charge by the plaintiffs that the defendants were guilty of contempt of the Thing by feeing a neighbour for his legal assistance. The other side had apparently done the same thing, but had not brought their legal adviser into court, carrying news of the objections to him and acting on his advice on their return.

It would appear that only the lawman could take a fee for his advice on points of law and practice, all other advice given to litigants being summed up in the old proverb that a man who is his own lawyer has a fool for his client. The crowd at the Law Hill give their advice and applaud each technical point raised and parried, as they would applaud a happy blow which cut off a man's leg in the fight which was often the end of the law proceedings.

Skapti's dislike of the *amicus curiæ* is only part of the great dispute which always goes on between the expert lawyer, whose power rests on his knowledge of the effect which a rash decision on rules of procedure will have on the general principles which he has carefully considered, and the general assembly of laymen who like to make their law as they go, not by laying down technical rules, which will govern a class of cases, but by judging each case on its apparent and generally deceptive merits, with the aid of a little knowledge, which is such a dangerous thing in law.

The same conflict goes on at the present day, to our sorrow, in Parliament between the Parliamentary draughtsman who considers a proposed measure in all its relations not only to possible future use but to the provisions which have been incorporated in it from past legislation or may be affected by it, and the energetic politician who makes nonsense of the Act by amendments, not considering either past or future, on the assumption that he is benefiting the people. In his ignorance he increases greatly the power of the lawyer caste.

Changes of Language.—Another cause acted to increase the power of the poet lawyer—the more rapid changes which took place in language before written documents had set up a standard of values. As a result, aphorisms or poetic metaphor in which the law is embedded, either acquire a private meaning only

known to the lawyer, or become to him unintelligible words only, which he can juggle with, engrafting on them his private interpretation.

Many instances of this occur in the Irish laws, where the commentator either admits that he does not know the meaning of the ancient text, or gives several alternative renderings of an obscure passage, showing either that it had not been acted on for a long time or that poets of a former generation had used the words with different meanings.

The same difficulty of language meets one in all collections of laws. There are scarcely any charters in Northumbria in very early times, probably because the oral traditions away from Rome lasted longer than in the Saxon south. But in the south and west of England the early Norman charters used words of which, says Kemble (*Codex Diplom.*, Introd., p. xliii), while they confirm the privileges, the transcribing monks admit that they do not know the meaning.[1] Some of these, such as "toll and team" and "sac and soc," which, though generally found in the charters of the first Norman kings, do not appear at all in the charters immediately preceding the introduction of feudal Norman law by the half-Norman Edward, were words belonging to the Saxon

[1] I once got a scolding in chambers for leaving out the words *et cetera* after "and your Petitioners will ever pray." But when I asked what *et cetera* in that connection meant, I was told, "I don't know, but you must put it in." I wonder if anyone does know.

customs and unknown to the Norman law, the Norman copyists probably writing from oral dictation privileges and immunities which had formerly passed by word of mouth only. All early charters were very short, the communal rights which accompanied the gift of a certain piece of land passing without any pertinents.

Very likely the Norman grantee was not particularly anxious to know the meaning of the words which gave him vague and unlimited powers, so long as, like the cabalistic pertinents of the Baron of Bradwardine's charter, they might be used to imply "upon the whole that the Baron of Bradwardine might, in case of delinquency, imprison, try, and execute his vassals at his pleasure." The meaning of many legal words in common use in early Norman times seems to have been so uncertain to the writers of a later generation as never to have been fully recovered. There are, says Kemble, many small glossaries of obsolete words in various MSS. of the twelfth century. The variations of phonetic spelling in those times were so many and so grotesque that a word could soon be spelt out of all recognition of its original technical meaning.

The Normans could not even spell the Saxon words which they included in their charters. Kemble gives instances.

The Use of Catchwords.—One great aid to memory, which meets us in all times and in all bodies of law, is the use of a short and concise cue of a few words or a sentence which

serves to bring to the memory a mass of arranged matter. According to Max Müller, books of aphorism are older than books of verse. "The great body of Hindu philosophy is based upon six sets of very concise aphorisms. Without a commentary the aphorisms are scarcely intelligible" (A. R. Ballantyne, Preface to *Sankhya Aphorisms of Kapila*, 1885).

All through the Senchus Mor occur short enigmatical phrases, a few words, not even a complete sentence, the first words of a traditional rule, cues which had often become meaningless to the commentator of a later age. Sometimes they are evidently proverbial, *e.g.* "Fools make illegitimate impoundings" (*A.L. Irel.*, ii. 97); sometimes only a reference to some former commentator, "Another version" (*ibid.*, 209); sometimes evidently to the aphorism which had been declared by a former Brehon, "The right of each is according to his strength" (iii. 87), "The five crimes of man no cause of happiness" (*ibid.*, 95).

The practice is universal. The terms of the writs, "Utrum, quare impedit," etc., etc., are instances of a usage to which every system of law could contribute a quota.

Verse in the Records of Law.—There is no doubt whatever that in the early history of all customary laws there is a time when they are committed to the memory in skaldic verse. The inquiries made by Sir William Jones in the eighteenth century into the Hindu law had taught him, says Sir Henry Maine, that

in their ancient languages there existed "a series of poems which might not unjustly be compared to the Homeric epics and the Attic drama, and laws twice as old as the legislation of Solon and the XII. Tables of Rome." The chief of these for him was the Law Book of Manu, which was in verse.

By the assistance of these and other like aids to memory the poet-lawyer historian was enabled to hand down to succeeding generations an immense and varied mass of law and history and general literature, a literature which only decays when it is confined to writing.

To come back to our islands, each of the collections of law preserved to us shows us either actual poems or indications of verse embedded in the prose of the laws. In the Senchus Mor various bits of verse from older books or sayings can from time to time be found embodying legal maxims, *e.g.* *A.L. Irel.*, ii. 314, iii. 534–7, iv. 341; and in the collection of Welsh laws, the fifteenth book of the Anomalous or Welsh laws, containing the privileges of the men of Powys, is in verse.

We need not expect to find much verse embedded in the collections of Saxon laws written down under the Roman monastic influence, but even here we find traces of an ancient poetical rendering. Speaking of the forms of oaths which follow the laws of Alfred in Thorpe, the editor says (p. 76): "It is impossible to read the oaths without perceiving at every turn their rhythmical quantity and

alliteration. An ear any way accustomed to Anglo-Saxon poetry will easily detect the disjointed members of their poetic formulæ, . . . The use of this kind of alliteration in early laws and judicial documents, as well as of final rime, was common to all the Germanic and Scandinavian nations." Apart from these forms, though we hear of Cædmon and of Aldhelm and Alfred singing as skalds, we find no trace of poetry in the Saxon laws. They were then what they remained in the twelfth century, a bare tariff for torts, such as was in use by all the communal societies, written down in the first instance under the influence of Augustine and his successors.

Saxon and other Tribal Law contrasted.— The laws collected in Thorpe show no sense of any attempt to think out a legal system either in principle or in mode of procedure. They are almost entirely bald lists of money payments for injury, *e.g.* a front tooth eight shillings, a canine tooth four shillings, a grinder fifteen shillings, and so on. The fines for rape and the many provisions for criminal assault on women do not give one any high idea of Saxon morality. If a man draw his weapon before an archbishop, he pays twenty shillings; if he rape a ceorl's female slave, five shillings. What are not money payments are Church regulations, which indeed govern the whole. They are the elementary provisions for regulating the disorder of a savage people too much under the overpowering influence of Rome

to do any original thinking for themselves. There is not the slightest trace in any even the latest of them of the exercise of the mind in problems of constructive law, or any glimmerings of the equitable doctrines, both civil and criminal, which we find in the work of the undoubtedly at that time more civilised Irishman.

Here the English records of customary law, and the Irish and other tribal records, and with them to a great extent the records of history, part company.

The English collections from Ethelbert to Henry I., as we have received them in MS., assume that the tariffs for tort have their origin in the commands of the lord the king, the anointed of the Church, whose commands were the law of the society—a wholly Roman conception.

The laws of Ethelbert, Augustine's convert, as we have them from the Textus Roffensis, a late twelfth-century MS., in which only they are found, are headed: "These are the dooms which King Æthelbirht established in the days of Augustine"; and the first paragraph runs: "The property of God and of the Church twelvefold; a bishop's property elevenfold; a priest's property ninefold; a deacon's property sixfold; a clerk's property threefold; Church frith twofold; m . . . frith [uncertain apparently] twofold." It is as we have it a series of dooms made by the king with the help of the Roman monk. It is more than

likely that these tariffs of tort, written down in the twelfth century, were written not as they existed in Ethelbert's time but as the monk of the twelfth century thought that they ought to have existed. We have no evidence of any description of their forms, when and if they were declared.

The tribal collections presume, though we may be quite content to believe that the practice did not always keep pace with the theory, that all the orders of society, the tribal Church, the freeman, the poet-lawyer historian, the king, the judges or professors of law, had a hand in altering or amplifying the unwritten custom declared and administered by the lawyer caste of each separate district. The law which is to be obeyed is made (as the regulations of the birleymen of Sutherland were made before the eighteenth century devastations) by the society as a whole through its accredited agents, and they were willingly obeyed because they were so made.

The laws of distress of the Feini, the Irish freemen, were, the Irish laws tell us, declared, "by the advice of the Church, from the customs of the laity, from the true laws of the poets (the Brehon or poet-lawyer caste), from the current opinions of the kings, from the advice of the judges, except what conscience and nature adds from true judgments according to analogy" (*A.L. Irel.*, i. 209). All this is referred by the commentator back to the time of Patrick.

How far the Roman law of the time of Patrick or of Henry II. affected the written tribal codes, as we have them in the Brehon laws and elsewhere, is a very large question for which there is very little assistance. But whether we regard the Irish laws as reduced to writing by Patrick or some later missionary or in Henry's time, there is no trace in them or in any of the tribal codes of the imperial and ecclesiastical view of law which rested on the Roman *dominium*, a view which coloured all English ideas of law from the twelfth century onwards.

The history of the two parts of the islands henceforward took a separate course, the laws civil and criminal, the tenure of land, all the political features which depended on either were influenced in England by the Roman doctrine; the two opposed systems of life, the communal and feudal societies, "dwell apart like two particular stars" until Henry's expeditions into Ireland and Wales, and the relations of Edward I. with Wales and Scotland, bring them into conflict—a conflict which goes on through the ages, a conflict which can only be understood by the Englishman and Lowland Scot if he will take the pains to search for and examine the roots, deep in the past, on which the ruins of the one system stand.

The change in the society in England, which only came to full fruition in the time of Henry II. and John, was the result of the rediscovery of the Roman law, and its study

at Bologna and elsewhere in the twelfth century.

The change was not at first at all appreciated by the ecclesiastics, who feared not only the use of the science for political purposes, but its effect on the study of the Fathers and other paths of literature, if it was too much encouraged by those in authority. Giraldus (*Gemm. Eccles.*, R.S. No. 21, vol. ii., Dist. ii., c. 37), discoursing on the increasing ignorance of the clergy, the "superficiales . . . cujusmodi hodie multos novimus propter leges Justinianas," quotes Mainier, under whom he had studied at the University of Paris, as prophesying, "Venient dies et væ illis quibus leges obliterabunt scientiam litterarum"; and St Bernard a little earlier complained, "Quando meditamur in lege? Et quidem quotidie perstrepunt in palatio leges, sed Justiniani, non domini. . . . Hac autem non tam leges quam lites sunt et cavillationes, subvertentes judicium" (*de Consideratione*, lib. i. c. 4). But in spite of their opposition the Roman law spread over Europe, to the detriment of other literary pursuits, carrying with it the Roman ideas which had been already adopted in the military feudal custom. Very gradually these conceptions were extended to all those matters of landholding, treatment of law cases, and satisfaction of offences which in the earlier communal society had rested on kinship.

CHAPTER V

THE BREHON LAW OF IRELAND

Our chief knowledge of this great source of common law, the customary law approved by the community for its own use in early times, comes from Ireland.

Here oral tradition lasted long. It may not have survived so long as in the Western Highlands, but the records which we possess of the customary law of the Highlands are for the most part Irish.

In these Irish records the position and duties of the poet-lawyer historian are the frequent subject of commentaries of various kinds, at epochs ranging from prehistoric times to the seventeenth century, and we read of him in the accounts of foreign critics and enemies as well as from the records of the Irish themselves. We shall not be far wrong if we take the description of the Irish Brehon as roughly typical of the caste in other times and in other countries.

At whatever remote period the Brehons or poet-lawyer historian caste of Ireland first began to commit to memory their rules of customary law, their entry into history begins only with the mission of Patrick to Ireland, when we see them as pagan druids either capping miracles with the saint or falling under his influence as Christian converts. They are

related to have discussed with him morals and customary law, and to have recited for his benefit the verses in which both were enshrined.

So long as custom remains the rule of action, which it does so long as society is stationary, as it is in the East at this day, the custom is venerated because of its antiquity, its unchangeableness, the law which altereth not. Novelty in custom is resented. New custom may from time to time be declared by the people in a body, but it is not so, as a rule, that the great body of early law has been developed.

When a new set of facts arises to which the existing custom will not apply, the ingenuity of the poet-lawyer historian is exercised to declare a fresh usage (in the first instance an inspired declaration) which will conform to the new set of facts. He will declare the enigmatical alteration in proverbial and probably poetic language, making his meaning as safely obscure as possible. But he does not attempt to declare the new usage by the assertion that he is making new law. That can only be made by the community itself.

If the old custom cannot be conformed by ingenious enlargement to the new facts, the Brehon must make it so conform by a barefaced fiction that it does so, a fiction wrapped up in much technical language and much poetical and cloudy verbiage. In this way the customary law is always being enlarged and applied

to a greater volume of the incidents of life, and the powers of the Brehon grow with his success in the process. Of the enlargement of the law by fiction all legal systems give us illustrations.

To take two illustrations of the process, one mediæval and one of our own day, both away from Ireland.

In Henry II.'s day in England, when a man was accused of a crime, he had no means of raising any issue except by a bare denial, to be followed by battle or ordeal. He had no means of introducing facts which would put an advantageous colour by way of exception on matter which he might find himself compelled to admit. The ordeal had fallen into disrepute and battle into disuse, and the judges of Henry and John, in common with all Western Europe, were feeling their way to a new procedure. They used local reputation, the verdict of the jury of the locality, to decide the issue, and they sold to the accused a writ permitting him to raise before the local jury a fresh issue of facts of which they would be pretty certain to have knowledge, by way of exception to the plea, the exception stating that the accusation was made *de otio et atia*, out of spite and hatred. If the exception was proved, it answered the original charge.

Then by a further development the words of exception were inserted in the writ when there was no ground for such a plea and no use for it, and by means of the insertion of

fictitious words, the original issue was brought before the jury with any exceptions which might be of use, and was tried by their local knowledge of the facts. It is an example of the beneficial effects of a legal fiction to loosen stubbornly technical law. By means of such fiction all early custom in its harshness, in days when society was stationary, was modified by the poet-lawyer historian.

In giving a modern example I must guard myself against any suggestion that I quote it with any desire to introduce or comment on controversial matter. It is used as being an excellent example of the use of legal fiction to enlarge administrative law, as barefaced a fiction as anything imagined by any mediæval lawyer, Irish, Indian, or English—the use as against persons disobeying any order of the policeman of the fiction that they had assaulted or obstructed the police in the execution of their duty, or that they were loitering with intent to commit a felony, a fictitious interpretation of certain Acts passed long ago for the prevention of crime (5 George IV., c. 83, and 34–35 Vict., c. 112, amended by 48–49 Vict., c. 75, § 2), which the police had found it convenient to use in later times for the purpose of preserving order in the streets. That it is a pure fiction is not understood by a great majority of people.

The Traditional Origin of the Writing of Irish Customary Law.—Except for Rome and for those parts of Western Europe in touch

with Rome, society throughout the early and middle ages remained stationary. When Rome fell, when the savages from the north and east swept down from the German forests on all that stood for humanity and civilised society and wiped it out, Ireland to her ultimate sorrow was exempt from the pangs of the new birth. She stood then outside the catastrophe.

Rome fell in 410. The Salic laws are said to have been drawn up before 421 by four eminent lawmen of the Franks and modified some sixty or seventy years later by the legal advisers of Clovis, just as between the days of Constantine and Theodosius the pagan law of Rome was modified so as to conform with the principles if not with the practice of Christianity. In 438 the Theodosian code was received in both empires; about the same date is claimed for the reduction to writing of the most ancient of the Irish bodies of law, the Senchus Mor.

The traditions of its written origin are very probable. The Christian missionaries would see to it that the principles of the Theodosian code recognising Christianity as an official religion should be the rule of practice among the peoples to whom they ministered. Patrick is said to have arrived in Ireland as a missionary in 432. It is most probable, most natural, and apart from controverted evidence a matter of history, that as soon as his influence enabled him to make any modification of custom, he should, after the Theodosian code had been

accepted in the empire, have followed the regular practice of all early missionaries and called on his converts to put into writing their existing customary law, and to modify it so far as its elements were not in accord with the Christian principles of the Theodosian code.

The traditional account, and a very likely one, is (*A.L. Irel.*, i. p. 15) that Patrick held a conference with the king and his great men at Tara, after his ministrations had been accepted, and that a committee of nine were appointed, three bishops, three kings, and three Brehons, doctors and poets, to revise the laws, and "what did not clash with the Word of God in the written law and in the New Testament, and with the consciences of the believers, was confirmed in the laws of the Brehons by Patrick and by the ecclesiastics and the chieftains of Erin"; and that for the poets "it was only necessary for them to exhibit from memory what their predecessors had sung, and it was corrected in the presence of Patrick, etc."

As Rome decayed and the barbarisation of the Roman world proceeded,[1] local collections of laws were written down among the barbarian races, combining the hitherto unwritten tribal custom with a basis of Roman law, making use of the Roman procedure

[1] Most valuable information and suggestion will be found in Prof. Vinogradoff's little book, *Roman Law in Mediæval Times.*

and Roman principles where the customary law made no provision.

Such would appear to have been the origin of the writing of the Irish Brehon law, the written collection correcting, so far as they were inconsistent with Christian doctrines, the oral local traditions declared as unchangeable law through long ages by the poet lawyer of Ireland. How long before such reduction to writing took place the law had been carried down by oral tradition, we have little knowledge. But the antiquity of the Irish law is only doubted because the student of history is encouraged to believe that no nations have any ancient history or ancient records apart from the Jews and the Romans.

A Theory of the Origin of the Unwritten Law.—The unwritten law remained, without doubt, in the breasts of the Brehons for centuries before, as for many centuries after, its reduction to writing. What was the origin of this law? I cannot help stopping for one moment to vent a personal theory of the origin of unwritten Irish law which may very likely have been suggested a hundred times before to-day, and will probably be laughed at.

Two literatures of civilised life have permeated the whole European world—the Greek and the Roman—with the exception only of the savages of North Germany with whom Europe is now in conflict, who never submitted to any system of civilised life. All the other peoples have been under the domination of

the thought of one or the other, and have adopted their alphabets, unless we are to except the Irish.

Roman and Greek thought, whether the Rome of the Twelve Tables or of Gaius or Ulpian or Justinian, whether the Greece of Plato or Hippocrates or Athanasius, educated the Roman and Greek peoples in law and science and theology. In consequence, the West adopted from Rome its system of landholding and cultivation, and, through the Roman papacy, the conceptions of injury as sin, injury to be punished as an offence against the sovereign State, instead of as tort against a private person to be compensated by money payments. To the barbarian nations of the West the Roman ideas, whether of landholding or of crime, came from the earliest times through the Roman missionary. But the gifts of the Greek, all the sciences, whether of war or physic or theology or chemistry, were stingily bestowed, because the Roman monk had little knowledge of them, and because he feared them as coming from a race which disputed with Rome the dominance of the ecclesiastical world.

One of the peculiarities of the ancient Irish law is its apparent independence of ecclesiastical influence; apparent only perhaps because in a system of oral common law, which developed from many centuries away from writing, the position of the druid or of the ecclesiastic would be as clearly defined in the memory of

the Brehon as the position of the lay freeman, and as little necessary to be formulated in writing. When and as the customs or their exceptions came to be written or noted down by the Brehons in Ireland, the communal society under which the group family held lands in common was still the basis of life, the ecclesiastic was not a caste apart, as he was under the Roman obedience, so that there would be no difficulty in the hands of wise innovators in making the alterations in custom, necessary to meet the necessities of the tribe of the saint, conform to the communal customs.

In this respect there is no sign of Roman origin. There is (*e.g. A.L. Irel.*, ii. 345 *et seq.*, iii. 29 *et seq.*, etc.) none of that claim for predominance of the Church, of the clergy as a caste apart, which we find ever increasing in the barbarous laws of Saxon Wessex.

Setting aside the customs common to the instincts of European life, which might in the seventeenth century have been ascribed, for want of more accurate classification, to the Roman civil law (customs which when they are noticed by English historians are called Teutonic), there appears to me to be very little evidence of Roman law in the Irish MSS. There is no trace of the *patria potestas*, or of any other of the distinguishing features of Roman social institutions, while there is much, especially in the position of the wife, which points directly away from it.

To give a single instance which would

appear to me to stamp the volume in which it appears as containing custom of a pre-Roman and pre-Christian date, I would cite a passage in *A.L. Irel.*, vol. ii. p. 351, as to the position of the woman in marriage. Laying down that both husband and wife could give legal evidence, a doctrine of itself showing a remarkable advance on early ideas of the woman's position in society, the Brehon goes on to give this as a reason: "Though the law cedes headship to the man for his manhood and nobility, he has not the greater power of proof upon the woman on that account, *for it is only a contract that is between them.*" It is hard to believe that that last sentence was the declaration of any Roman missionary or even of any Brehon of the Christian era.

Contrast with this the following preamble to a judgment in the Northumberland Assize Rolls (Surtees Soc.), p. 275 in 1279. "The plaintiff, who claims a man as his villein, has produced as suit but one male and two women, and for that the said women are not to be admitted to proof because of their frailty and also because a male, who is a worthier person than females, is being claimed, etc." The English law was dominated by the Eastern ideas of women's position, the Roman monastic idea, which had been strengthened by the Crusades. (But see Bereford in the *Year Books*, quoted p. 115 *infra.*)

What was the origin of this unwritten law?

Clearly not Mosaic. The provisions in *A.L. Ire.*, ii. pp. 359–91, as to contracts made by husband and wife ("where the wife has the property the husband stands in the place of the wife") have no ring of Eastern custom. I submit that this Irish customary law was largely of pagan origin, and of a paganism before the Christian era. The mixture of barbaric custom resting on primeval socialism and of equitable doctrines resting on a foundation of philosophic thought forbids us to believe that the Brehon law of Ireland was only one of many collections of tribal custom with a Roman veneer. May it have been indebted to the Greek?

Original ideas are so scarce that we cannot afford to bestow any on the small nations of literature; the great empires, especially in their decadence, are generally credited with the forms of thought which are strange to us and therefore supposed to be abnormal.

The towering predominance of Rome in the law and politics of mediæval Europe, its escape from the destruction which overwhelmed the East, and its long imperial papal history, the ignorance of the Latin monk of Greek literature and history and his jealousy of Greek theology induced neglect of the pagan Greek thought, the thought which when Rome was in its infancy impressed the mind of the Western world.

We look to Rome for all political and military organisation, for roads and aqueducts

and agriculture, for a great system of law and for ideals of colonisation. But she offers us no philosophy of life, no guide in morals, no theology except obedience to her military will, no theory of life apart from hard facts, any more than her imitators who rely for the propagation of their ideas solely upon brute force. For philosophical thought, for ideas, we must look to Greece and to the East.

Cæsar, speaking of the Druids of the west of Anglesey and Man, tells us that they committed their teaching to memory, but that they knew and used Greek characters. Whether or not he was correct in his facts, it is highly probable that some knowledge of Greek philosophy, some of the speculative spirit of the ancient pagan world, might come to the West with the Greek traders, the bold seamen who dared the Atlantic from Cadiz and Marseilles. The ships that went from Cadiz across to Cornwall for tin might very likely continue their voyage to the south of Ireland, and carry with them a knowledge and a spirit of thought which was foreign to Rome. When Columbanus proposes to return to Ireland from Gaul he goes down the Loire to take an Irish ship from Nantes, the trade route by which the Greek merchants of Marseilles shipped their Cornish tin.

I should like to link up the ancient liability of the Irish women to serve in battle with the conception of the militant Greek women in the *Republic* (v. 457): "Then let the wives of

our guardians strip . . . and let them share in the toils of war and in the defence of their country." The comradeship in war which was the lot of the Irish women up to 676, with the equality which such a condition must always presume, was very exceptional and inconsistent with the early status of women. But as law of land holding it could hardly be traced to Athens, or even to Sparta.

I will be content with asserting the belief that the ancient Irish customary law was most probably for centuries before Christ greatly influenced by Greek thought, and that a great deal of Plato's imaginary Republic might be read to advantage by the side of a study of Irish institutions. There is, I believe, a persistent tradition of Mediterranean origin, that certain tribes crossed Europe to Ireland from Mycenæ, a tradition which it is not safe wholly to ignore. And there are a good many points of likeness between the Greek and the Irish.

Though there is every reason to believe that the origin of the writing of Irish customary law as it is finally found in the Senchus Mor is correct, and that Patrick did correct the local customs by his Theodosian law, and that his scribes did make an abstract of some of the customs, there is no reason whatever to suppose that the whole was at once written down, or that the now existing MSS. represent the state of the law in Patrick's day. There are frequent references in the oldest text of

the Senchus Mor to previous declarations of the law. All such writing down of early laws deals only either with procedure, the means of execution of the law and the remedies, the proceedings in distress, or with status, with the question of the capacity to sue.

The Irish law continued to expand with the needs of a changing society, the commentaries on the text showing its direction, and it continued to do so with an equitable practice far in advance of the English common law, until, being incompatible with the advantages to the Crown to be gained by the enforcement of the feudal doctrines, it was crushed out and abolished by the Jacobean lawyers, who imagined, as so many English and Scots then and since have imagined, that ideas of law and morals must be evil and unsocial which would not square with the decayed feudalism which culminated in the doctrine of the divine right of kings.

CHAPTER VI

IRELAND AND IRISH LAW FROM THE ANGEVINS TO THE STUARTS

When Henry II. invaded Ireland, the conception of the king as the owner of the soil and as the maker and fountain of laws, a con-

ception incompatible with the Brehon habit of declaration of law, had not yet become prominent. Henry and his sons took only the position of lords of Ireland, as of Aquitaine, taking as Ardri the dues assured to them by custom, the contributions in kind from the sub-kings and chiefs,[1] varying and increasing them so far as their power and opportunity extended, and providing for the needs of their feudal followers in the same way in the territories already occupied by the invaders. This was a practice which did not at all end with the invasion, but continued for centuries as a curse upon Ireland, since the restrictions which regulated the use of the custom as an archaic means of supporting the rulers of a tribal community were wrested by the invaders and by the Irish chiefs who imitated them to justify perpetual raids and plundering expeditions on their neighbours' territory to gain a "great spoil of cows."

Neither Henry nor his sons made claim to ownership of the whole land of Ireland, nor did they interfere with its laws as administered by the Irish. But they introduced the feudal

[1] The rights and gifts as between the different rulers for their several communities are set out with much elaboration in the ancient Leabhar na-G-Ceart or Book of Rights, of which two MS. copies are said to be in existence of the date of the end of the fourteenth century, matter asserted to have been collected and written down by St Benignus, the disciple of Patrick, but as a whole from its contents clearly of later date. St Benignus may have begun it.

customs into the territory which the invaders controlled, and they made such terms as they could with the rulers of the tribes beyond their reach, trying of course always to impose on these latter with the help of the Church feudal aids and imposts; as when in 1205 John writes to Meyler Fitz Henry to try to get better terms from the king of Connaught for a grant to him of Connaught at a yearly rent, and to procure yearly gifts of cows and other contributions for the king's castles (*C.D.I.*, vol. i., No. 279).

Where the Irish wished to make use of the feudal law, which might be to the advantage of the chief, it was only granted in exceptional cases as a bought favour; as when in 1215 John grants to Donell Conell the enjoyment of English law and liberty (*C.D.I.*, vol. i., No. 659).

After John's time the feudalising process strengthens; the efforts to enforce feudal dues become more frequent; *e.g.* in 1217 the king commands the justiciary and archbishop of Dublin to impose an aid on the cities and on the kings of Connaught and Thomond (*C.D.I.*, vol. i., No. 812). The tendency of feudal doctrines and the unifying influence of the papacy operated to turn the Ardri, an overlord taking dues and maintenance, but not concerning himself with land or local government, into a king who claimed to be owner and donor of the whole soil, whether he had conquered it or not, whose laws were the only laws to be

obeyed, whether or not his writ ran in any part of it.

It became no doubt increasingly a matter of difficulty to arrange a mode of living between two opposed systems of law, one expressing common ownership of the soil among kinsmen and a ruler who, like the guardians of Plato's ideal Republic, was supported by contributions from the people, the other tenancy of the land by an individual holder who accepted the grant from a lord not akin, and generally absent beyond seas, who claimed in himself the ownership of the whole soil.

The Roman law had afforded on the Continent a foundation on which the customary codes of the barbarians could be supported and varied. But in Ireland there was no such basis of law common to both systems. In the continental development the Romans, though in the position of a conquered people, held all the prestige of men who had been the acknowledged masters of the world; the barbarians revered their laws and copied them. The laws of Ireland held no such predominance in men's minds over the feudal customs of their invaders, nor had their religious or social customs such superiority over the refinements of the English court as to entitle them to an equal use.

Apart from the Roman law there was no common ground on which the two systems could be combined, and after the break between Henry and John with the papacy the

English lawyers were not willing to look upon the civil law in any other light than as the intrusive system of an alien enemy. Henceforward jealousy of the civil law hastens the imposition of the feudal customs on Ireland.

The Conflict between English and Irish Law.—After the English had lost their continental possessions and had failed to retain their hold on Scotland, the existence of the two systems side by side became impossible. When the settlers in the English pale gave way before the counter-attack of the native Irish in conjunction with the old Anglo-Irish feudal lords acting as Irish chiefs under the Brehon law, the English kings, unable to enforce feudal custom upon the Irish whether in or beyond the pale, took the course of treating the Brehon law as "wicked and damnable," "hateful to God and repugnant to all justice," "which reasonably ought not to be called law, being a bad custom." They refused to acknowledge it in any form and punished where they were able both those who obeyed its provisions and those who administered them, while refusing to the Irish except in the most especial cases the use or benefit of their own Anglo-Norman customs. They do not appear ever to have attempted to understand either the principles or the practice of the Irish law.

How far the Anglo-Norman law could be enforced depended from henceforth on physical strength, which becomes the sole test of obedience. The English king from being an

acknowledged Ardri, acknowledged apparently quite as much as any of his predecessors of Irish origin, becomes a foreigner imposing a foreign yoke on a reluctant people. The two systems of unwritten law, English and Irish, each beautifully unconscious of the ideals which lay at the heart of the other, struggle on side by side through the centuries, the one supported by the papal power resting on the king's *dominium*, on the theory of the grant of all land to individuals or communities, the other, outlaw and prohibited, on a conception of social life in which all had the use of the land. The longer the conflict went on, the more bitter it grew, the weaker politically and the stronger nationally grew the social ideals before the physical force, first of England and later of England and Scotland combined, before the federal power of the king as owner of the whole soil.

The English officials wished to vest large districts in the grantors of the Crown, whose estates, held upon feudal tenure, would be subject to forfeiture for treason. But the Irish, who all had some interest in the common soil, fought against feudal tenure and primogeniture, and the Anglo-Irish relapsed into the position of the tribal chief who shared the lands with the sept. This deprived the Crown of its powers of forfeiture and made it difficult to enforce feudal rights.

The barbarous law of treason, developed in the time of Edward III., gave him the right to

treat as dishonourable traitors men who had met him as honourable foes in the fair field, on the ground that they owed him fealty. As the feudal law recognised no rights of the society apart from the king's grant, the law enabled the English king to seize to his own use the lands of the community in which the chiefs, whom he had goaded into rebellion, had the greater share.

It also enabled him to include under the definition of treason any social custom, such as fosterage, which conflicted with feudal authority or with the dues which formed part of the profits of the Crown.

To what this led may be seen in the urgent suggestions of Spenser and others for the use of the most barbarous methods. "In the last general war over there," says Spenser, "I knew many good freeholders executed by martial law whose lands were thereby saved to their heirs which should otherwise have escheated to her Majesty."

As the struggle went on the oral decisions of the lawyer caste of the tribe might yet command wide acceptance so far as his personal following went, as arbitration enforced by the boycott of the community, but they lost all the prestige of law governed by an imperial sanction. To the English the Brehon law became only the "bad custom" of a banned and outlawed alien enemy, regulating the life of an outlawed race with whom the State was waging a bitter and relentless

war, and as custom which was a fundamental cause of their want of success.

Meanwhile the oral decisions of the same lawyer caste in England were building up the English common law which was to be forced on Ireland.

As a result, by the time when a genuine effort was made to deal with the conditions, when James I. and VI. thought fit to receive all the Irish into his protection, and model their holding of land under the decayed feudalism of his day, the evil had sunk too deep into the heart of Irish society to be remedied by any such measures. "Even where the Irish profess subjection," says Spenser, "they practise the Brehon laws among themselves." But such Brehon law had by this time sunk to the condition of being a collection of local customs, and the Brehon had become only a private, literary, local counsel and legal adviser of the tribe or family, an arbitrator in disputes among friends.

We have incidental notices from time to time after the English invasion of the Irish Brehon; but it is under the shadow of this idea of the divine right of the king as fountain and only source of law that for the most part we get our notices of the poet-lawyer historian of Ireland. It is a study of conditions at once appalling and puerile. A people living themselves in the midst of a revolution in every phase of thought, just beginning to apprehend a great literature, recasting ideas of religion

as in a hot furnace, were incapable, wrapped up as they were in a truly German belief in their own mental and moral superiority over other peoples, from pure self-conceit and racial self-interest, of appreciating the value of legal ideas which conflicted with their own common law, or of seeing in them anything but what was evil.

They had lost sight of the conception of law as the declaration of custom agreed to by the whole people, and as binding on them because made by themselves, and thought only of it in the Roman sense as the act of authority of the anointed king in some sense inspired.

"This I must say for Scotland," says James in a speech to the English Parliament in 1607, "and I may truly vaunt it; here I sit and govern it with my pen, I write and it is done, and by a clerk of the council I govern Scotland now which others could not do by the sword." In 1609 he goes further to a position incompatible with social organisation in which the people were to have any share in the making of the law: "The state of monarchy is the supremest thing upon earth; for kings are not only God's lieutenants upon earth and sit upon God's throne, but even by God Himself they are called gods." When kingdoms, he said, began to be settled in equity and polity, "then did kings set down their minds by laws which are properly made by the king only . . . it is presumption and high contempt in a subject to dispute what a king can do

or say that a king cannot do this or that, but rest in that which is the king's revealed will in his law." It is from a society imbued with such theories that we have many notices of the Brehon and of Irish history.

CHAPTER VII

THE POET-LAWYER HISTORIAN IN PROSPERITY AND IN DECAY

In Ireland.—As each part of the islands in which the customary law was that of the communal society came into conflict with the feudal law of England and of south-eastern Scotland her imitator, the invader set his face against the poet-lawyer historian caste, and legislated not only to destroy the law but to abolish the Brehon who administered it. He was banned by statute, he was steadily written down by monks and travellers and authors and Anglo-French lawyers, and he was prevented as far as possible from exercising any branch of his profession.

The prominence which Ireland obtains throughout her history in this respect has been owing to the fact that with her the conflict of legal system began and long continued when her communal form of society was in full operation, while in other parts of

the islands the battle was only fought when it was in a state of decomposition or decadence, or when other causes, such as the nearness to England or the expansion of trade, which, owing to the English control of the seaports, has always been denied to any part of Ireland except to Ulster,[1] had reconciled men to the feudal society. If there had been no strip of sea dividing Ireland from the larger island, or if Ireland had been too barren or like Man too insignificant to invite aggression, there would have been no Ireland—in politics.

In their period of prosperity the Brehon lawyers would seem to have been a well-organised, highly educated class of men of business, very expert in their profession, covering with efficiency all the branches and alley-ways of legal procedure, ready as lawyers to prepare and argue statements of facts, or as arbitrators to decide questions of law, or as bailiffs to watch or take part in the distress or other actual proceeding involved in the case, so as to ensure the correct carrying out of the technical forms. They are mentioned as doctors (ollams) of the law, called in to decide doubtful points, and as poets or advocates to argue them. The Ollam of Brehons was one of the highest class, the lawyer employed to

[1] Henry II., when he released to Strongbow his rights over the territory conquered, kept in his hands the seaports of Dublin, Waterford, and Limerick, to secure his entrance into the country and to enable him to control the sub-kings. See *C.D.I.*, vol. i., No. 235.

pronounce judgment in a case; "a head in mire," it is said, "is the direction of a pleading unless it is under the direction of an ollam" (*A.L. Irel.*, v. p. 101).

They had, as lawyers always have had and ought to have, pupils trained in the practice of the law, entrusted to them in literary fosterage, the pupil being in the place of a son to the teacher who trained and chastised him, the pupil committing to memory the poems and aphorisms or condensed rules which contained the law as to status, and social relationship, and procedure and damage or compensation for injury. The pupil shared his first fees with his teacher, and either took a place in the rules of succession of property to the other.

The caste had also schools for legal education, in which well-known doctors lectured and propounded problems of law for discussion and resolution in archaic verse.

Describing how the Book of Aicill (Aicill is the name for the hill of Skreen near Tara, in Meath), a compendium professedly of the opinions of two lawyers, Cormac (A.D. 227–266) and Caenfaeladh, came to be written, the compiler tells how Caenfaeladh, who had been wounded in a famous battle at Magh Rath in 642, came to Toomregan in Co. Cavan to live. Toomregan was the residence of teachers of literature, law, and poetry, and "whatsoever he used to hear rehearsed in the schools every day, he had by heart every

night, and he put a fine thread of poetry about them and wrote them on slates and tablets and transcribed them into a chalk book" (*cailclibair*).

Here we come to the first connection of the oral tradition with the written manuscript. The historical student or the lawyer carries in his remembrance the unwritten text as it is declaimed by the lecturer, or as he hears it in the pleadings before the official arbitrator, or as he picks up the rumours which are handed about the monastery or the court; also the unwritten commentary which has been handed down by memory for centuries with the interpretations and additions of many generations of poet-lawyer historians which is taught in the schools, and he puts a fine thread of poetry about it and writes it down. Many students are at work on the same facts or the same legal problems in the same way at the same time; many bits of history or law are so digested and written down from memory and pass from mind to mind; and if the little bit of parchment escapes the perils of water and fire and mould, and the needs of the shoemaker, or the desire of some later student to preserve something more interesting to himself on a palimpsest, the slight notes develop in time into the original history of William of Malmesbury or Walter of Coventry, or into the Treatise on Social Connections or the Year Books.

We may with very little hesitation ascribe

a like origin to the Year Books. The young barrister hears the arguments of cases in court or the talk among the advocates and clerks outside the court. He makes notes of what he hears at the time, possibly on parchment, but as a much more likely habit notes in his memory, as making rough notes on parchment would be both expensive and inconvenient and less likely to be accurate.

Then at his leisure, after comparing his memories with those of others, they are corrected and amplified with the jokes of Bereford or the disputes of Sharshulle and Stonore, and are written down in the commonplace book with all sorts of other things in the form in which they have come down to us. They are occasionally not contemporary.

An Aristocratic Profession.—As was the case in all tribal communities, societies which realised that equality was incompatible with the liberty which they enjoyed, the poet-lawyer historian class was aristocratic, there being a strict gradation of rank, each branch of the profession conducting the business of its own class. An advocate of the upper class could not plead against one of a lower; if a plaintiff of a lower class was proceeding against one of a higher, he must employ an advocate of the higher class, and *vice versa* (*A.L. Irel.*, ii. pp. 85–87).

The profession was also most scrupulous that no unfit person should be a member. A stranger (that is, one not akin to the sept), a

bondman, or a landless man could not act as a law agent or advocate, as he could not enter into any agreement for his clients which the community could not set aside (*ibid.*, p. 87).

The Divisions of the Law.—The Irish MSS. contemplate three sources of this common law in which the Brehon must be learned. He must be learned in "Feinechus," the unwritten common law of the freemen, the law of nature, as it is called, in contrast with the written law of Patrick; he must be learned in poetry so far as the Feinechus is concerned therewith, that is to say, he must be acquainted with the traditionary unwritten commentary; and he must be learned in "the white language," glossed as one who is learned in "reading so far as the Feinechus is concerned therewith." To the Feinechus all is referred, and it would seem that it is the Feinechus law reduced in later days to writing and not the "white language" itself which has come down to us in the MSS. of the Brehon laws (*A.L. Irel.*, v. p. 93).

These sources of law are in turn subdivided into the Cain or Canon, the customs applying to all the country, the general groundwork of social law; the Urradhus,[1] the local modifications; and the Cairde, the interterritorial customs or intertribal agreements relating to unwritten treaties between the tribal communities for whose performance the king

[1] Cain and Urradhus are contrasted in *A.L. Irel.*, iii. p. 237.

and the people give hostage pledges (*A.L. Irel.*, iii. p. 135).

Like our English common law, all these common laws had remained unwritten, handed down by tradition only and by daily use, and only altered by the community. The people, it is said, proclaim Feinechus law (*A.L. Irel.*, iv. pp. 56, 97, 169, 241, 335, etc.). There is no trace anywhere in these laws of new legislation. The law when written down was the stationary custom of a stationary society.

Like the Indian laws of which Sir Henry Maine speaks (*Early Law and Custom*, p. 9), and other bodies of law of which we have knowledge away from the influence of Roman law, they may be affirmed to consist of "a very great number of local bodies of usage and of one set of custom reduced to writing pretending to a diviner authority than the rest, exercising consequently a great influence over them and tending if not checked to absorb them."

Even where there is a strong federal authority, backed by limitless force, freemen prefer as far as possible to settle their affairs locally between themselves without applying to what may be only too often a tyranny of fools. Much more when the federal authority was weak or non-existent, the greater part of the body of social transactions was disposed of by the chief of the local community assisted by his Brehon adviser, or under feudal law by the corresponding lord of the manor and

his bailiff, a vague and very wide jurisdiction not only unwritten but unrecorded. The heroes and heroines (*i.e.* people of the chieftain class) and the *tuaitha* (translated country people) were ruled by their own chief (*A.L. Irel.*, iii. p. 15), much as the greater part of offences and disputed questions are disposed of to-day by magistrates paid and unpaid, and not by the High Court. The system is going on now in the same way.

The Intellectual Development of Law.—The commentary could not fail to be eminently scholastic. In such a stationary archaic society, when men began to argue points of development of law, they could be guided only by an abstract sense of fairness and convenience, as an evil declaration of custom would permanently react upon themselves, or by the pleasure, like the schoolmen, of intellectual disputation, to which both English and Irish law owe much of their development.

This gives the commentary, to the layman, the appearance of over-refinement, of unreality, of being a mere exercise of the imagination, a dissertation for pupils. The lawyer would know that it was not so.

The tribal lawyer caste of Ireland at least professed and tried for a high ideal. "Three falsehoods which God most avenges in a territory," says the Brehon (*A.L. Irel.*, iv. p. 53), "are additional gain by false contract; decision by false witness; false judgment for hire." As far as we can judge from the

Brehon laws and the Annals, the lawyers at least acted up to their principles.

If we follow the poet-lawyer historian into the other parts of the islands, we shall find the same characteristics of oral tradition, the Brehon as judge, as advocate, and as executant of the law, and the chief, the country gentleman wealthy in cows, acting as justice and holding his local court, informed by his Brehon for local matters, as was Mr Justice Shallow of the rotulorum, and Mr Justice Western, who proposed to commit his sister's maid to gaol for ill manners.

CHAPTER VIII

THE POET-LAWYER HISTORIAN IN HIS PROSPERITY AND HIS DECAY

In Wales.—The tribal system in Wales would appear to have been modified from the first by the early connection with Rome and England. The ecclesiastic with his exceptional status is more prominent in the laws, though, judging by the accounts given of his difficulties as archdeacon by Giraldus, there had been much backsliding by his time. Yet the ecclesiastic, though he might have the necessary qualification to sit in judgment as a member of the sept by privilege of his land, could not pass

sentence, as he could not be punished for wrong judgment (*A.L.W.*, Dim. I. xxxi. 2), which means that the church community could not be mulcted for his fines.

Another difference is that, unlike the Irish, the Welsh laws, though the passages may refer to a late date, show some connection with writing. For instance, the Anomalous Laws, XIV. xlv., treating of appeal from judgment, refer to a "decision in written authority through the arguments of the learned, for law books are of public unquestioned authority, and it pertains to credit the best book and the book of the best judge." In the preface to *A.L.W.*, Ven. III., it is stated that Jorwerth the son of Madog, who is credited with compiling the Venedotian code, collected his laws from divers books there mentioned. *A.L.W.*, Dim. I. xiv. 24, also refers to written laws as used to decide a question of disputed judgment (and *A.L.W.*, Anom. XIII. ii. 195). The books are generally spoken of as the work of the judges.

Apart from such exceptional matters, which are not numerous, the glimpses we get in the Welsh laws of the profession show characteristics very similar to those of Ireland, and the account of the origin of Howel's laws tallies with that of the Senchus Mor and of the Salic laws.

The account (in the Preface to *A.L.W.*, Ven. III.) says that Howel Da summoned to him six men from every cantrev, four laics and two

clerks, and that the cause for bringing the clerks was lest the laics should introduce what might be contrary to the Holy Scripture. This is followed by confirmation at Rome.

In the Welsh laws the chief's or manorial court is very prominent. They contemplate the hearing of cases relating to land before the lord, assisted by judges and priests (*A.L.W.*, Ven. II. xi. 10–30). When there is a case in the lord's court there is with him as assessor not only a judge of the superior court who had jurisdiction over the whole kingdom, but a judge of the district, the cymwd, a division consisting of fifty townships, being a half of the great legal and administrative unit of the hundred or cantrev (*A.L.W.*, Dim. II. viii. 11; Anom. XIII. 213). The Brehon who acts as judge is appointed by the chief of the cymwd.

But it is not the lawyer or judge who makes the court or the laws. In all early society the king, the chief, the lord, the country gentleman dispenses justice; the common lord is an essential for the administration of the law as for the making of it; no land must be without a king who has a court and criminal jurisdiction (*A.L.W.*, Ven. II. xii. 8; Anom. VIII. xi., 13; *A.L. Irel.*, ii. 281), for to no one does the privilege pertain but to the lord of enacting a law, and neither is that privilege invested in him but with the consent of his country and kindred in convention (*A.L.W.*, XIII. ii. 62).

In the Welsh laws we find the equivalent of the Irish geilfine chief, the head of the

group family, a judge who has jurisdiction by privilege of land as a freeman, the chief over the community occupying the common land. The lord of the manor in England has similar jurisdiction over the people in his territorial unit, but the kinship is absent.

There is a curious description in the Preface to *A.L.W.*, Ven. III., of the making of a judge. One wishing to be a judge learns (equivalent to reading in chambers?), and his teacher commends him to the judge of the court, who proves him and recommends him to the lord, who invests him with judicial functions. As the judge was liable to pay for a bad judgment, the mode of election was probably better than it seems.

In the Isle of Man.—Up to 1270, when John Comyn and Alexander Stewart landed an expedition in Man to enforce the cession of the island made by Magnus of Norway in 1266 and totally defeated the Manx, who lost the flower of their people in battle, the Isle of Man rested under its long line of Scandinavian kings. Then and afterwards, under the guarantee of both Scottish and English kings, it preserved its communal laws until a late time.

All writers who mention the Manx laws speak of them as unwritten up to the middle of the seventeenth century and testify to their beneficial character. Blundell, writing in 1648–56 (*History of Man*, Manx Society), says of them: "There never was nor at this

day is any one treatise extant written, printed or in any way published—which conteyneth any entire catalogue of their laws and customes or jurisdictions. After the *jus innatum* (that is the common law of all the world) they had a *jus non scriptum* as a thing holy and sacred and by them delivered to posterity by oral tradition only. From all antiquity and even down to this day the Manxmen doe call these lawes breast lawes, as being deposited and locked up in the breasts of their deemsters only." He also asserts that their laws and customs had never changed.

Deemster Parr, who about 1693 made an abstract of the laws then in use (never printed), says in his dedication to the Earl of Derby: "Many of these lawes have heretofore (and partly yet) been held, retained and exercised only traditionally and no entrance made of them upon record but such as did fall out upon the transaction of certain cases."

The making and the declaration of the laws, which agrees fully with all we know of the declaration of customary law in Iceland, the Orkneys, Ireland, and elsewhere, is described in Chalmers' *Treatise* (vol. x., Manx Society), as follows: "The Governor and Officers do usually call the 24 Keyes of the Island especially once every year, viz.: upon Midsummer day at St John Baptist's Chappell to the Tinwald Court, where upon a Hill near unto the said Chappell all the inhabitants of the island standing round about a fair

plain they hear the Laws and Ordinances agreed upon before in the Chappell and published and declared unto them." Waldron, writing in 1726, says: "The law suits are neither expensive nor tedious, every man pleading his own case, and bringing the matter into Court by purchasing for twopence a token (a piece of slate marked with the name of the Governor) from the Governor or Deemster." When the deemster required information as to articles stolen, the whole neighbourhood was summoned before him, and every individual must either acquit himself by oath or on refusal be considered guilty.

It was not likely that the Anglo-Norman lawyers would approve such simplicity of legal procedure. The Brehons who practised as advocates when required were described as "a kind of lawyers who take fees,"[1] and in a statute in 1763 as "ignorant and evil-minded persons who provoked law suits and pretend to practise as attorneys therein."

In 1429 Sir John Stanley commanded the "breast lawes" to be written down; but in spite of this the Brehons continued until the middle of the seventeenth century to administer their unwrit opinions.

Unwritten Law in the Orkneys and Shetlands.—We have to go to the Icelandic and

[1] The deemsters as late as the seventeenth century were paid by a voluntary contribution of custom (Haining's *Guide*, p. 105, quoted by Train, *History of Man*, vol. ii. p. 207).

Norwegian Sagas to find for the Orkneys and Shetlands and the countries north of the Shin and Oikel accounts of the unwritten law or of the Brehon as he appears in very early times in Ireland and Man. The documents relating to legal proceedings in these islands contained in Johnston and Clouston, which follow the usage of the Norwegian courts to which the islands belonged, do not date back much before the fourteenth century.

In early days the earl acted so entirely as impromptu arbitrator in this confined district that there can have been little room for the refinements of law. There is no recognisable allusion to any kind of Law Thing in the O.S. The procedure would seem to have been on the lines of an incident depicted in the O.S., chap. 90 (1150–51).

Sweyn, a noted viking, who had killed a man, sent word to Earl Rognwald, asking him to take "an atonement for the slaying of Arni Spindleshanks. And as soon as these words came to him (the earl) summoned to him all those who had the blood feud for the slaying of Arni, and made matters up with them so that they were well pleased, and he paid up the price himself. Much other mischief the earl made good with his own money that was wrought that winter both by the Easterlings (the Germans) and the Orkneyingers, for they pulled very ill together." We find these payments by the king or chief on account of one of the community in all parts

of the islands, in England developing into the jurisdiction of the lord of the manor as the man responsible for the community. The chief who paid had a hold over the man for whom he had paid.

The Pagan Thing, which plays such a great part in the Icelandic Sagas, the general Assembly to which the contending parties came set up their booths and tied their horses, prepared to traffic or argue subtle law points or fight, a great legal fair which like the Court at Tynwald in Man assembled at certain specified times "to establish and make laws, to reform abuses and to treat of anything which conduced to the public good of the island," faded eventually into the Law Thing, governed until 1670 by Norwegian law, the Law Courts both head and local having a foud or president, a lawman the judge or assessor who took evidence and made decrees, and roithmen the assize of neighbours drawn from the most prominent hereditary udallers of the district. In Shetland, which fell earlier under the federal rule of Norway, the local men were replaced by a well-defined official class.

But the written records, as they have come to us, are few and late and show strong indications that the proceedings in court, even when "the suits were called, the court lawfully fenced, the assize chosen and admitted," were wholly or almost wholly verbal. There were no deeds at all except those between the most

powerful people until the Stuarts used them to deprive the udallers of the lands held by unwritten title. The first deeds between parties early in the fourteenth century in the collections both of Clouston and Johnston are simply memoranda of conveyance by verbal agreement confirmed by handshake.

In a conveyance of lands in Shetland in 1355 (Clouston, No. vi.) the parties recite, "We were present and saw the handshake"; (No. vii., 1360), "We have made an agreement with handshake, it was settled under this our handshake," the parties to the deed of confirmation not being able often to write their own names.

In a decree of court held by the sheriff-substitute of Orkney (Clouston, No. lxv.) in 1578, the assize of twelve named men headed by *David Scollou scriba curiæ pro tempore* signed the decree "wyth owir handis led at the pen of David Scollow." The transaction to which the decree referred had been a verbal agreement made forty years before between brothers and sisters for the purchase of the sister's lands to prevent the alienation of the family property. The heirs of the sisters disputing the matter, witnesses testified to a release by conversation between the original parties "sittand at their supper."

The written documents were generally directed to all who "see or hear read this letter." Even where, in 1538, after verbal evidence the "tenor of letters" was offered

(Clouston, No. xliii.), they were letters from "honest reputable men who then came before us in the court with living voice and full sworn evidence." The verbal evidence was heard by many in public court; it was acceptable as being the best evidence, far more reliable than the written documents which could be very easily forged, a forgery difficult to detect after a few years by men the business of whose lives lay in action.

So long as the right of alienation of land was limited in the communal system by the reversionary rights of the heirs, the conveyance of land by deed must have been, except for church purposes, a very exceptional matter.

Procedure in Communal Cases.—Neither in the Irish, Manx, nor Orkney records is there any suggestion of written pleadings. In Wales hearsay evidence was allowed in land cases (*A.L.W.*, Gwent II. xxxvi.), care being taken that the necessary technical words and actions were performed and spoken. The pleadings must have been brief, as both parties knew not only the facts but the general principles of the customs. The advocates or parties argued only on the application of the custom and the measure of damages.

The fee payable in Ireland to the Brehon in the carrying out of this cheap and expeditious justice was, for the conduct of the whole case, one-twelfth of the thing in demand. This was not merely an advocate's fee; it was evidently an inclusive fee for

carrying out all the proceedings taken by the advice of the advocate, including the duties of writ-server and bound bailiff—in fact, all the proceedings in a distress from start to finish.

For example (*A.L. Irel.*, iii. 317–19, of every levy its third), the Irish law, speaking of levying to enforce payment, contemplates a levy beyond the boundaries of the community, and the case where the man cannot be approached without swimming, or without a boat, or without a long round by land. In these cases the Brehon, besides his fee of one-twelfth, received a mileage of one-fourth to one-half according to distance. As the legal profession performed these actions in person, we must picture the Brehon swimming to serve notice, and possibly fighting on landing.

Swimming was not the only physical exercise in which the conduct of a case might involve the learned advocate. "Three," say the Irish laws (*A.L. Irel.*, i. 1289, ii. 125), "are at the carrying off of a distress, *i.e.* a plaintiff, a distraining advocate (a pledge man, ii. 125), and a witness who has honour price" (*i.e.* a responsible freeman); "and four awaiting it at the pound of the plaintiff, a pleading advocate, a witness who has honour price, a contract binder (*i.e.* a guarantee or surety), and a hostage."[1] It is possible that for his twelfth the Brehon might be constrained to head off across unenclosed and possibly wooded country

[1] The ancient text of ii. 123 expresses it aphoristically, "three carry off to four"; also i. 227.

a heifer making for home, or to defend himself with his fists against a defendant who objected to the seizure of his cow. The lawyer of the richer country naturally despised such men.

CHAPTER IX

FOREIGN AND NATIVE NOTICES OF THE BREHON

By the opening of the seventeenth century the violence through which Ireland had passed, her geographical position off the commercial routes of the world, the exclusion of the native Irish from the seaports, the general use of writing, and the persistent depression and persecution of the Brehon law by the English Government as creating serious political difficulties had so diminished the prestige of the poet-lawyer historian as a class as to leave him as little else than a mere registrar of the customs and arbitrator in the local quarrels of the tribe or sept of which he was the Brehon. It is at this period of their decay and of their humiliation that we have several most instructive notices of these men and of the law they taught, for the most part from their enemies the English—notices which are of interest as showing the different views taken,

apart from the official animus against the caste and its law, by onlookers of the oral tradition which had so entirely passed out of use for the classes who could read.

The Four Masters, quoting an entry in the *Annals of Clonmacnois* of the death of a very learned Brehon there described as "the best learned in Ireland in the Brehon lawe in Irish called Fenechus," add the following note by the seventeenth-century editor: "This Fenechus or Brehon lawe is none other but the civill lawe which the Brehons had in an obscure and unknown language, which none could understand except those who studied in the open schools they had. Some were judges and others were admitted to plead in the open air as barristers, and for their fees, costs, and all received the eleventh part [the twelfth, *A.L. Irel.*, iii. p. 305] of the thing in demand of the party for whom it was ordered. The loser paid no costs. The Brehons of Ireland were divided into several tribes and families, as the MacKeigans, O'Deorans, O'Breasleans, and MacThollies. Every contrey had its peculiar Brehaire dwelling within itself, that had power to decide the causes of that contrey and to maintain their controversies against their neighbour contreys, by which they held their lands of the lord of the contrey where they dwelt. This was before the lawes of England were in full force in this land and before the kingdom was divided into shyres."

Camden in his *Britannia* says: "The nobles and potentates aforesaid have their lawyers belonging unto them whom they term Brehons . . . who being a sort of most unlearned men, upon certain set days, upon the top of some excessive high hill, sit to minister justice unto the neighbour inhabitants between such as are at variance and go to law. . . . If any be convict evidently of theft they give sentence either to make retribution of the same or recompense by a fine imposed upon them."

We can take choice of the two seventeenth-century theories that they administered the civil law or were a set of most unlearned men—or is it just possible that the uncritical English critics were most unlearned men?

The Irish Annalists at least knew the difference between the Irish law in the "obscure and unknown language" which required an education in the schools, and the civil law of Rome. The *Annals of Ulster*, ii. 61, record the death of Domnall Na Enna, "eminent Bishop of the West of Europe and Font of generosity of the world, Doctor of either Law, namely of the Romans and of the Gaidil."

The comments were not all of this ignorant nature. There is an interesting reference to the Brehon law in a *Briefe Description of Ireland*, published in 1589 by one Payne, an Englishman who had been in the country.

In 1586 Gerald Fitzgerald, the sixteenth Earl of Desmond, had been attainted, and the lands of which he was chief, amounting to

574,628 acres, were forfeited to the Crown, the feudal lord ignoring any rights in the land of the society of which he was chief. Elizabeth encouraged settlers in Munster to take up the forfeited land. Payne was an undertaker (that is, he had agreed to settle a large tract of land), with twenty-five other men, each of them receiving 400 acres in Co. Cork.

There is no evidence of partiality in Payne's account, but he could hardly have wished to descant on anything which might discourage his partners in their venture. He speaks very highly of the Irish, and amongst other words of praise he says: "They keep their promises faithfully and are more desirous of peace than our Englishmen, for in times of warres they are more charged. They are obedient to the laws, so that you may travel through all the land without any danger or injurie offered of the very worst Irish and be greatly releeved of the best.

"As touching their government in their corporations where they bear rule, is done with such wisdom, equity and justice as demands worthy commendations. For I myself divers times have seen in several places within their jurisdictions well near twenty cases decided at one sitting with such indifferencie that for the most part both plaintiff and defendant hath departed contented. Yet many that make shew of peace and desireth to live by blood do utterly dislike this, or any good thing that the poor Irishman doth."

The literary and legal writers of the seventeenth century and even of the centuries before seem to have been well aware in their minds of the healthy character of the unwritten law which they set about to destroy, and of the good character of the men who administered it. But they were deterred by some hidden cause from applying their knowledge.

I should suggest literary conceit, the vanity which rests upon a consciousness of supposed mental superiority, such as has overtaken the German people at the present day, as one cause; the great Elizabethan and Jacobean world of poetry and prose in its prime could not fail to despise the undeveloped imaginative literature of the politically weaker nations, expressed in "an obscure and unknown language," of which they were wholly ignorant.

Another cause affecting the legal profession was the jealousy of any system of law which might compete in ever so small a degree with the English common law which had stood by itself as a bulwark against the pretensions of Rome. The belief that the unknown law in the unknown tongue might prove to be the civil law in disguise must, I think, have helped to bring about that extraordinary habit of trying to govern and to absorb Ireland, in unbounded ignorance of her history, literature, and laws, which, coming to full fruition in the seventeenth century, has enured to our sorrow to the present day.

They all apparently appreciated the prin-

ciples on which laws should be imposed on the people, and to some extent recognised the value to the Irish of the institutions which they set about to destroy.

Spenser speaks of the Brehon law as "a rule of right unwritten but delivered from one to another, in which oftentimes there appeareth great shew of equity," though he at once proceeds to point out its evils. But he realises the folly of forcing the English law relentlessly on Ireland. Laws, he says, ought to be fashioned unto the manners and conditions of the people to whom they are meant, and not be imposed upon them according to the simple rule of right. He impresses that the excellence of the English laws had come through civil commotion and the continual presence of their king, that is the power to enforce them. "No laws of man," he very truly says, "according to the straight rule of right are just but as in regard to the evils they prevent and the safety of the commonweal they provide for." But carrying his views into practice he urges and defends measures of cruelty and repression which made a desert of the beautiful land and left centuries of civil war behind them.

The lawyers write with full appreciation of the effect of the unwritten law on the society. Chief Baron Finglass, in the reign of Henry VIII. (quoted in vol. ii. of *Tracts relating to Ireland*, Irish Archæol. Soc., 1843), contrasting the good observance of the Brehon laws with the ill keeping of the laws made in Eng-

land, says of them: "Divers Irishmen dothe observe and kepe souche laws and statutes which they make upon hills in their country firm and stable without breaking them for any favour or reward," a judgment which would come home to anyone who has read Mr Pike's account (Preface to Y.B. 20 Edw. III., vol. ii. p. 50) of the conditions in England in the year 1438, not long before the enactment of the Statute of Kilkenny to destroy the "bad custom" of the unwritten law of Ireland.

Coke, praising the laws of the Isle of Man, "the like whereof are not to be found in any other place," says of the Irish: "There is no nation of the Christian world that are greater lovers of justice than they are, which virtue must of necessity be accompanied by many others" (4 *Inst.*, 349); and Sir John Davies, James I.'s Attorney-General, pays the same tribute to the speedy and satisfactory administration of the unwritten law and to the law-abiding character of the Irish people.

In his *Discovery* he uses almost the words of Coke: "There is no nation of people under the sun that doth love equal and indifferent justice better than the Irish, or will not rest better satisfied with the execution thereof, though it be against themselves, so as they may have the protection and benefit of the law when upon just cause they do desire it. . . . I dare affirm that for the space of five years last past there have not been found so many male-factors worthy of death in all the six circuits of

this realm as in" the one western circuit in England. "For the truth is that in time of peace the Irish are more fearful to offend the law than the English or any other nation whatsoever." The law being so beneficial, he did what he could to destroy it.

The same author gives us an account (Letter to Robert, Earl of Salisbury, 1605) of one of the Irish lawyers of his time, a chronicler and principal Brehon of the county of Fermanagh, who was called upon to produce an old parchment roll which contained the particulars of the mensal lands and rents of M'Guyre, the chief of the country.

The old man, "so aged and decrepid as he was scarce able to repair to us," at first denied that he had the roll. It had been burnt, he said, by the soldiers in the late rebellion. Being put on his oath by the Lord Chancellor, who was with Davies, "he confessed that he knew where the roll was but that it was dearer to him than his life, and therefore he would never deliver it out of his hands unless the Lord Chancellor would take the like oath that the roll should be restored unto him again. This being done the old man drew the roll out of his bosom where he did continually bear it about him; it was not very large but it was written on both sides in a fair Irish character, howbeit some part of the writing was worn and defaced by time and ill keeping." This is one of the last notices of the poet-lawyer historian of Ireland.

But the unwritten common law continued to be administered in many ways by the local men of various parts of the islands. We have a very curious testimony from a most unexpected quarter in the eighteenth century to the continued administration by the chief of the unwritten law.

In Adam Smith's *Wealth of Nations* (bk. iii. chap. 4) is the following passage:—"It is not thirty years ago since Mr Lochiel, a gentleman of Lochaber in Scotland, without any legal warrant whatever, not being what was called a lord of regality, nor even a tenant in chief, but a vassal of the duke of Argyll's, and without being so much as a justice of the peace, used notwithstanding to exercise the highest criminal jurisdiction over his own people (*i.e.* his own sept, the social community not having yet entirely disappeared in the Highlands). He is said to have done so with great equity, though without any of the formalities of justice."

The Reasons for dwelling on Oral Tradition.—I make no apology for the inordinate length at which this matter of oral tradition, of the unwritten sources of law and history, of the poet-lawyer historian class of the communal society, has been treated, as I desire to impress on readers how great a part this plays in the formation of the records of history.

The written monastic records of England, on which historians so much rely for their facts, give us an absolutely false perspective

of history, leading to unsound conclusions and to neglect of contemporary economic causes, written as they are from gossip unsupported by evidence even of facts and far less of motives or intentions, and written from the sole point of view of a body of men living outside the social system which they helped to destroy, unless we can correct them by means of what we can learn of that system from other sources.

To take a prominent example, one of the worst results of the decision of the modern historian to represent Magna Charta as an act of legislation by the feudal and ecclesiastical barons, directed against the supposed wickedness of King John, is that the assumption puts out of sight its real character as a public declaration of ancient unwritten custom, custom which had been abused by all parties, of which the king as sole administrator of the nation had had the greater opportunity for abuse. It must therefore not only be restated as it had frequently been in the past, but it must, in accordance with the spirit of the time, which was hastening to reduce to writing all old customary law, all past legends and political history, be written down and put in safe custody for better keeping.

The very vagueness of its phrases (*e.g.* chapter 16, that no one should do greater service than that due) rests on the customary nature of the duties and rights declared and publicly known, and not on the evil disposi-

tion of a king. Customs, good, bad, and indifferent, they had hitherto been handed down, and as a matter of fact continued for a long time to be handed down, by oral tradition only. The very few copies made of the charter were locked away in the safety of church muniment chests, as had been the charter of Henry I. produced by Langton, and its origin as the declaration of custom was forgotten as the social system decayed.

But apart from such incidental illustrations of the relation of oral tradition to historical facts, we cannot pretend to understand the nature of the difficulties which have arisen and yet continue to arise in the dealings between England and the rest of the islands, or between one class or men and another, unless we first make an effort to obtain knowledge of the unwritten laws founded on human instincts, governing social institutions which have been superseded by our artificial modern society.

At the risk of introducing controversial and extraneous matter I would point out that the troubles of that unhappy country Ireland have not been in the past religious but economic, the result of the relations of the country with an absentee government before the events of the sixteenth century superadded the feud of religion. The foundations were laid of the opposition ever since existing between Ireland and the rest of Britain when the great opportunity for healing the sores

of the people on the marriage of the son of Edward III., resident in Ireland, to the heiress of the vast properties and influence of the Burkes was lost, and the evils of civil hatred at the same time strengthened by the virulent provisions of the Statutes of Kilkenny. The rulers then as later failed to comprehend the meaning of the social institutions which they set about to destroy, and the Roman priest and the alien pope took due advantage.

A striking example of the view induced by this want of appreciation of former social institutions is to be seen in the Dedicatory Preface to the volume of Reports in Ireland published by Sir John Davies, the Attorney-General for Ireland of James I. (whose opinion of the Irish regard for law has been quoted above), the first Report published of the Anglo-Irish courts. At the time at which he wrote, in spite of the Saxon conquest, the Brehon law, the common law of Ireland, was obeyed in all parts, except in those districts near the eastern sea-coast where the English common law could be enforced. This English common law and the Irish common law had sprung from the same common origin by declaration of custom by the people. But, in common with most of the English thinkers of his time, Sir John Davies was in that condition of mind, not uncommon when a lawyer contemplates his own legal system, of being unable to conceive of any earthly institutions either in the past or present which were worthy of even casual

consideration beside the height of moral supremacy represented by the common law of England. The idea that English law might be a salutary economic development does not seem to have occurred to him.

His point of view (especially in its omissions) is so illuminating as bearing on historical authority, and on the relations between Ireland and the greater island, that it is worth quoting at some length. It shows that he regarded the Irish common law as a thing detestable and to be abolished by any means at hand, though his knowledge of the society which it serves would appear to have been very scanty.

"There were no records of Henry II.'s time remaining whereby it may appear that he established any form of civile government in this land. King John made the first division of counties in Ireland, published the lawes of England and commanded the due execution thereof in all those counties which he had made." Then he goes on: "For the common lawe of England is nothing else but the common custome of the Realme; and a custome which hath obtained the force of a lawe is always said to be *Jus non scriptum*, for it cannot be made or created either by charter or by Parliament, which are Acts reduced to writing, and are always matters of record, but being only matter of fact and consisting in use and practice it can be recorded and registered nowhere but in the memory of the people. . . .

"And this customary lawe [he is speaking of the English common law, not the Irish] is the most perfect and most excellent and without comparison the best to make and preserve a commonwealth, *for the written lawes which are made either by the edicts of princes or by counsells of State are imposed upon the subject before any triall and probation made. . . . But a custome doth never become a law to bind the people untill it hath been tried and approved time out of mind.*"

With this burst of admiration for the customary unwritten law he laments that in the former reign of Elizabeth the law (*i.e.* the English common law) was never executed in certain new counties by any sheriffs or justices of assize, "but the people were left to be ruled still *by their own barbarous lords and laws.*"

He proceeds to contrast the English customary common law not with the Irish customary common law, which it was to supersede, but in his panic fear of popery with the Canon law, quoting John's answer to Innocent, the answer of the barons at Merton, "Nolumus leges Angliæ mutari," and the rolls of Parliament of 11 Richard II. In the perfect faith of his intellectual superiority and his ignorance of the Irish laws and language, he worked hard to destroy the customary law which he praised and to impose upon the Irish subject the feudal practices made and enforced by the "edicts of Princes or by counsells of State."

As for the law, so for political history, behind all the real facts transmitted to us, behind all the false assumptions and wrong conclusions, lie the oral authorities. The same class of men was responsible for both. The family bard or Brehon was the authority equally for the reduction into writing of the traditional customary law and for the family annals which had been handed down to him by generations of bards; the archdeacon or clerk or monk or court chaplain drew up the written laws, acted as judge, and collected the floating "news" from which he wrote the chronicles. Both rest wholly on oral tradition.

The oral tradition may be harder to demonstrate for political than for social history, and we must expect in the historical chronicle theological and political bias which we shall not find in the records of law. But in each instance it is necessary to ask, if we wish to avoid a very partial and one-sided view even of political history, where and how and from whom the often stationary and secluded first authority, if we can find him, heard the tale or collected the conflicting rumours, and how far he was open to prejudice and self-interest. Check and counter-check is the only safe method.

Mr Pike, in the Preface to Y.B. 15 Edward III., p. xliv, gives us an example of such notes from memory or gossip which have become by constant iteration an integral part of constitutional history. He is speaking of the

"obscure story" of the monk of Birchington relating to the dispute in 1341 between Edward III. and Archbishop Stratford. "It could be shown in what manner the monk who had heard some gossip about the Exchequer more than forty years after the event converted into an indignity put upon the archbishop," *i.e.* that he was arrested and carried to the bar of the Exchequer, "an appearance by attorney to which neither the archbishop nor his attorney had the slightest objection and which was not in any way connected either with treason or felony." Speaking of the use of this fiction by one author, he says: "No authority is cited except the State trials in which occurs at second or third hand the story told by Birchington and repeated *usque ad nauseam.*"

Besides, we cannot separate the oral tradition of the laws from the oral tradition of political history, which is the story of the making and alteration of laws and customs, of the competency of the ruler to make, alter, and enforce them, their effect on personal freedom, on taxation, on commerce, on public morals, the refusal of freemen in the face of them to give personal service or money on the grounds of conscience for defence of a common country.

The men of the generation which followed Sir John Davies were quite aware of this connection in their struggle with Charles, and Charles was aware of it himself. A proviso offered to the Petition of Right, reserving the

king's sovereign power, was refused by the Commons, Pym remarking on it: "All our petition is for the laws of England, and this power seems to be another distinct power from the power of the law." Charles in his declaration against it refers to the judges as "the persons to whom solely under me belong the interpretation of the law."

To this day our political constitution is unwritten, resting on tradition and capable of very sudden and violent development, and our laws in great part are also unwritten.

PART II

CHAPTER X

THE YEAR BOOKS

WHAT was this English common law for which Sir John Davies would destroy all other systems of law? We can answer that question, so far as it is necessary to answer it here, by the records of the Year Books and of the Eyres.

Just as the common law of Ireland grew out of the accretions to unwritten custom preserved in the memories of generations of poet-lawyer historians until for more convenience

and certainty the rule (or more probably the exception to the rule) was reduced into writing, so the common law of England continued to develop in the memory of the Anglo-French lawyer until it also partly, but only in very small part, came to be written.

It was written partly (and here is the only difference between the two systems) as statute law, "the edicts of princes or counsells of State," as Sir John Davies calls it, "imposed upon the subject before triall and probation made," but written also like the Brehon law from the declarations of existing custom made by prominent jurists such as Glanville and Bracton, who correspond in that sense to Cormac and Cænfæladh, and in the last instance, like so much of the Brehon law, from the decisions of judges and opinions of advocates in court. It is with this last source of the common law that we deal in the Year Books.

They are not likely to be popular reading, but they are a most fascinating subject of study. In them, as Mr Maitland says (Introd. Y.B. 1–2 Edw. II., Selden Society), "we can bring the tissue of ancient law under the microscope. Often have we been told to seek in Roman law the clues that will guide us through the English maze. It is high time the converse and complementary doctrine were preached." One may add that another guide to the English maze would be a comparative study of English and Irish common

law, both based on custom, both based on verbal opinion and decision, both based on social life.

The Year Books are the latest of the contemporary mediæval records with which this book deals. But they are absolutely unique in forming a well-defined link between oral tradition and writing, between the voice of the judge or counsel, whose actual words we may believe we hear and of whose personality we feel a certainty, and the written manuscript, in some cases not contemporary, in which the actual spoken words are embedded.

They come in this respect very much nearer to us than the dicta of the Irish Brehon or of the author of the T.A.C.N. or even of the Grand Coutumier. They are, as Mr Maitland points out, the vernacular report of an oral debate recorded for the first time in history.

They are unique. There is, so far as I know, no other record in the world, unless it is the Bible, in which we have recorded the actual words of real men living many centuries ago, their intimate thoughts almost laid bare to us, as when Stonore C.J. and Shareshulle J. discuss, what is law ?

The earlier language of the Year Books, says Mr Pike, "is indeed of unique philological value, for it is a representation or an attempted representation of the language of everyday life as actually spoken, to which the nearest approach in most of the dead languages is that of the drama." So long as French was the official language of legal proceedings in

England, that is to say up to the year 1364 (36 Edw. III., c. 15), the Year Book reports preserve for us the living tongue, the French of English society as it was in daily use in the law courts and in ordinary life.

But for language, possibly the Brehon lawyers might be as real people for us as Lowther and Bereford. But the Irish themselves are ignorant of the Irish of the past and utterly forgetful of their great history, while our soldiers in the trenches in Flanders are talking something that will sound like law French. The Year Books, even when untranslated, in the old law French and in black letter, are more of a reality to us than the Irish law tracts.

Of course the main line of cleavage between the Irish and the English common law was that the one stood for the communal society, and the other for the feudal society based on individual land ownership.

The Irish lawyers spent a large part of their energy on contract, on the capacity to contract, on the guarantees for the safe keeping of contract, on the penalties for its breach, a system encouraging the performance of all equitable obligations; the English lawyers, five centuries behind the Irish, concerned themselves with the strict formalities of an antique system of land transfer, and enveloped the whole language and forms of pleading with an ocean of technicalities.

With them the pleading under the writs

was a clever game of chess, a fencing with words, as a Cabinet minister answers questions, using all words in their most technical sense and concealing anything which might tell against the pleader. In common with all early systems of law, the Year Book procedure addresses itself far more to the form of the remedy than to the question of the right.

Litigation over Technical Forms.—It is a rare thing in these Year Books to find any principle of law laid down, or any attempt at equitable arbitration between the parties. All the fighting between counsel and all the suggestions and decisions of judges are upon questions arising out of the form of the writ, the order of procedure, the time and place for the admission of evidence, and the correct form of pleading.

Where the words were so placed that they might appear or be made to appear to belong to the wrong person, the demandant was *in misericordia pro falso clameo*, though there is no suggestion that anyone was deceived (16 Edw. III., vol. i. p. 196). The complaint of the Chancery as to the form of the writ is a good example of law French (*ibid.*, p. 197 and note 14): "Les clerkes de la Chauncellerie dient qe ceo bref nest pas de fourme: qar en bref conceu en le post, le qui ipsa serra en mylieu la clause et en le per a la fine; et si avant covynt mayntener fourme du bref come matere."

Evidence, if we may judge by a case

reported in 16 Edw. III., vol. ii. pp. 86–90, was merely the best evidence which could be got, without regard to whether it was evidence according to our views. A question arose as to the death of a woman's husband. She first says that he died at Antwerp in the king's army; later she produces a certificate of his death at Bristol from the mayor and aldermen; finally she produces two witnesses who swear that they saw him buried at Ipswich. The court accepts this last as final, though there is nothing to show that the witnesses knew him, and one of them was under age, and one came from Chester.

The counsel, like the parties in the House of Commons of our day, which derives its procedure from much the same source, decided beforehand the points upon which they would fight, ignoring all the realities of the case. Says Lowther (20–21 Edw. I., p. 420): "I will aver the seisin of King Henry as of fee—will you aver the reverse, namely that he was not seised of fee or of right? You must say that as we must necessarily be in opposition." The opposing counsel objects to such a straightforward issue; he would like something more roundabout.

In another case (Edw. II., vol. iii. p. 115) the one counsel says to the other: "If we are to abide judgment, we must abide it upon some certain point" (the case is about an advowson), "so let us agree that he presented as to a gross and then let us demur."

When the facts upon which these fine-spun webs are woven break down, counsel are not in the least abashed. Says Lowther when the facts which he had alleged were shown to be false: "Every word spoken in court is not to be taken literally; they are only curial words" (20–21 Edw. I., p. 280).

The slightest slip in pleading was fatal. The Archbishop of Dublin brings a writ for land which he claims to be "the right of his church in Dublin." But in his count he counted that it was "his right and the right of his church of St Patrick in Dublin." The writ was quashed (20–21 Edw. I., p. 378). In a case in Y.B. Edw. II., vol. iii. p. 99, a writ abated because instead of saying "two messuages and a moiety of one messuage" the pleader said "two messuages and a half." Bad grammar or the wrong writing of a word was sufficient to abate the writ.[1]

As an example, once for all, of the fencing over technicalities by counsel (20–21 Edw. I., p. 14), A brings a writ of cosinage against B, saying that, his cousin C dying seised without issue, the property descended to D as brother and to him A as grandson of D. The defendant's counsel denies that C died without

[1] *E.g.* 12–13 Edw. III., p. 111: "Nota qun bref apres le vewe fust abatu pur faux Latin pur ceo qil avoit *avia* ou il duist aver este *aviæ* en un bref dentre la disseisine." And 16 Edw. III. (2nd vol.), p. 64. And *ibid.*, pp. 499–507, *quæ* instead of *quas*. 17–18 Edw. III., p. 538, *Haselshawe* and *Heselshawe*; p. 548, *Trussel* and *Trusselle*.

issue, but claims that he B is in possession as C's son. A's counsel objects to this form of defence, and says if B wishes to abate the writ he must say that he claimed by the same descent. He must, he says, make B privy in blood and show how he is privy, etc.

The judge supports this. B being made to claim by the same descent points out that as son he is nearer in blood than the grandson of a cousin's brother. Then plaintiff's counsel takes another line. You cannot claim; you are a total stranger; for the reason that C was a man in religion, and never married a wife and begot you in fornication, and so on. To which defendant's counsel answered, "This exception is in the Right, (that is, could only be pleaded in a Writ of Right), therefore you shall not be received thereto." Apparently this contention was successful.

Or again, in a claim about the presentation to a living, the prior pleads that the church is filled by one, and that he is patron. "What have you to show that you are patrons? If you have anything, put it forward." "There is no need to plead so high up in the Right. This is a possessory writ. . . . For that would be to plead in this court touching the plenarty (*i.e.* the living being full) which ought to be pleaded in Court Christian" (20–21 Edw. I., p. 282).

Sometimes in this confusion of mechanical objections the judges themselves are uncertain as to the remedy. Counsel saying, in an

action for partition against a tenant by the curtesy, "This is a writ of Right," Hengham C.J. answers, "This is not a writ of Right, nor a writ of Wrong, for in truth we do not know what writ it is or on what law founded" (33–35 Edw. I., p. 65).

The refinements of the schoolmen find their echo in the reasonings of the Anglo-French lawyers; *e.g.* the doctrine of warranty for land brings up a discussion as to vouching to warranty an infant *en ventre sa mère* (6–7 Edw. II., p. 108).

The judges joined in the game and gave counsel every opportunity and assistance in raising futile objections. The plaintiff's counsel claiming, "We do not understand that he (the defendant) shall be admitted to another exception," Hillary J. says, "He shall be, because he shall falsify your plaint by as many causes as he can, and you can maintain it by as many matters as you know; therefore answer" (17 Edw. III., p. 360). To a counsel who anticipated an objection: "You fish before the net; the time for disclaiming has not arrived" (33–35 Edw. I., p. 74). "He has no need to make this disclosure to you but when the court asks for it or drives him to it" (1–2 Edw. II., p. 179); and, rather sadly as it seems to me, "In this case there is no way of pleading except to disclose the truth" (1–2 Edw. II., p. 119). When further disclosure is hopeless the court says, "You are at issue, and what you will not reveal in plead-

ing, a good jury will reveal and will tell the truth" (*ibid.*, p. 450).

In a case Merton *v.* Merton (Edw. II., vol. ii. p. 50) the *reductio ad absurdum* is reached, but not, to our minds, in the way Bereford C.J. intended. The demandant was insisting on knowing what interest a doweress claimed in the property. Bereford says, "We do not think that A has any need to discover what right she claims." He gives as his reason, "for if in this judicial writ (of Scire Facias) you could try A's estate, you would be pleading in this writ as if it were a writ of right, and in that way you would abolish the writs of mort d'ancestor, ael, and cosinage, and the writ of right, and all other writs, which is absurd."

As an example of the procedure in the English courts the following case (reported in 33–35 Edw. I., p. 96) may be of interest, especially as it gave rise to an effort at verse by one of the barristers. One R, the son of Nicholas, sued out an Appeal of Robbery against the parson of the church of Cudworth and others, saying that they had feloniously robbed them of an ox, etc; the parson pleads that he is a clerk and could not answer without his ordinary; and the others put themselves upon the country. Bereford acts as counsel for the defendants and quashes the appeal; "because we see well that he who sues the appeal is of so tender age that he knows not to distinguish good from ill, and against whom this judgment cannot be

carried out, and who when he comes to full age may reverse the thing, therefore the court adjudges that they shall be quit of this appeal. And because you, Nicholas, who are the infant's father, have acknowledged that you have procured and maintained this appeal, and what you have acknowledged it is not necessary should be inquired of by the country, the court adjudges that you go to prison." Counsel asks for damages and is told he must sue for them. "And so whereas they put themselves on an inquest they passed quit at the suit of the king and of the party, and they had their damages without taking an inquest."

The report continues: "Upon this Simon de Hibernia made these verses"; and seventeen lines of very bad hexameters follow in the MS. (Addit. MSS. 5925), but they do not carry the case any further, and it is not necessary to reproduce them.

CHAPTER XI

THE YEAR BOOKS (*continued*)

The Contrast of Speed.—A more striking distinction between the two systems was the promptness of the tribal procedure, and the endless delay of the Anglo-French pleadings.

There is not, I believe, one word in any of the volumes of the Brehon laws which suggests any delay in procedure, nor with a civilised system of law would there seem to be any need for delay.

Delay, non-finality, was the watchword of the Anglo-French law of the Year Books. I cannot help a suspicion, though I admit it is only theory, that it can be traced to the example of delay caused by perpetual appeals to distant Rome. Anyway, no volume of the Year Books is free from flagrant examples.

Where the claim is for a horse which is stated to be still in pound, the answer is that it has been delivered six and a half years before the writ was purchased (21–22 Edw. I., p. 54). A poor plaintiff (20–21 Edw. I., p. 78), arguing in support of his right to impound beasts found in his corn, says, "May I not impound them before the termination of the plea of the taking, which may last perchance two or three years?" A freeman of London, visiting his birthplace, who is seized as a villein, only gets judgment four years afterwards (1–2 Edw. II., p. 308). Bereford C.J., who was fond of telling stories, tells one (Edw. II., vol. iii. p. 74) of a refractory tenant distrained on, who brought replevin against the possessor of a manor, "and they pleaded for thirty years," the tenant winning. Then, "a long while after," the heir of the grantor to the possessor brought a writ of customs and services against the tenant and

recovered. A suit begun in 33 Edw. I. and stopped owing to the king's death was renewed in 3 Edw. II. (Edw. II., vol. iii. p. 163).

Not unnaturally, where it suited the parties to a case to prolong it with a view to put off the evil day for ever, they took advantage of the technical nature of the law to obtain endless delays. First one of several defendants fails to appear, and another day has to be appointed for him. Then when he appears another is absent. In a case where this had been going on for seven years, the judge admitted that there was no remedy (19 Edw. III., p. 12). The editor of the Year Books of Edw. I. (20–21 Edw. I., p. 12) quotes a pathetic protest of Mr Justice Prisott when Littleton (Mich. 35 Hen. VI.) prayed judgment in a Quare Impedit. It sounds as if it might have come now from the Speaker of the House of Commons about some question of procedure on Woman Suffrage or Home Rule. "I marvel mightily that you are so hasty in the matter: and I have seen similar matters pending for twelve years; and this matter has been pending only three-quarters of a year."

Mr Pike, in the Preface to Y.B. 13–14 Edw. III., p. xxxvi, speaking of a case there reported (13–14 Edw. III., p. 16), gives a summary of his experience as editor of some of the forms of delay. "The case," he says, "I have succeeded in following through every one

of its stages from Common Pleas to Parliament, from Parliament back to the Common Pleas, from the Common Pleas to the King's Bench upon writ of error, from the King's Bench again to Parliament, from Parliament back to the King's Bench, and so on to judgment in error there." Only rich people made suit in the king's courts.

Yet the matters over which they disputed were often of extremely small value; *e.g.* trespass is brought against two persons in 1340 for three pots, one pan, and two tables carried away in 3 Edw. III. (1330 ?). Gayneford, for one of the defendants, said: "As to the pots and tables you heretofore brought a writ of trespass against us for one pot and one small cup which are the same goods . . . and for one table on a taking made in the seventh year of the king (1334 ?), whereas it was found we did not carry them away (14–15 Edw. III., p. 212). The taking here was apparently for rent in arrear. There is a similar case in 15 Edw. III., p. 306.

Especially noticeable were the delays and proceedings in ecclesiastical cases where the king was concerned.

The Clergy as Litigants.—The clergy and the monasteries play a great part in the litigation of the Year Books, and use excommunication freely as a means of winning their cases. A case reported in Y.B. 20 Edw. III., vol. i. pp. 214–232, is typical of the relations between Church and State, the conflicts between

spiritual and lay courts in those days, and of the long delays by which, with a weaker opponent than the king, the Church's adversary would likely be worn out.

There was always the difficulty in view that when a settlement had been arrived at between the lay and spiritual courts the pope might interfere.

A writ of prohibition had been issued to the bishop of Norwich to prevent his interference with the Abbey of Bury. The bearer of the writ was excommunicated by the bishop. A writ of contempt was issued against the bishop's commissaries. They answered that the bearer Freiselle was excommunicated, and that being so they were not bound to answer him. It was held that they must answer him, unless it was shown that the excommunication referred to something else.

When the case was called on again the commissaries produced letters patent of the Archbishop of Canterbury purporting to show that he had found among the acts of the Court of Arches that Freiselle was under greater excommunication for manifest contumacies. The judges stood out, holding that such excommunication must be referred to the service of this writ against the bishop, as there was no other cause stated, which was apparently the fact.

Then the bishop raised the plea that the validity of the excommunication could not be tried in the Common Pleas, but only in the

spiritual court. The judges gave judgment against the bishop's commissaries, with damages £1000. (See note, p. 226 of Y.B.)

Then the bishop obtained stay of execution. This was followed by a further writ to proceed.

Then the bishop sued out a writ of error into the King's Bench, whereupon the king interferes peremptorily and sends letters under the privy seal to the justices ordering them to proceed (continued in 20 Edw. III., vol. ii. p. 322).

But the matter did not always end in this way. In a case (20 Edw. III., vol. i. p. 307, note) where a weaker adversary, a layman, brings suit against a parson and chaplain for taking into Court Christian a matter relating to cutting timber, they answer with success that he is excommunicate. And see 6–7 Edw. II., p. 18 (vol. xxvii. of Selden Soc.) as to personal nature of excommunication.

How well the system could be made to work to the advantage of the ecclesiastic is shown in a case in 14 Edw. III., p. 156, where an excommunicated man, who has been absolved, complains that he cannot get his letters of absolution. The defence is that he was under excommunication for various matters, and that he has only been absolved in respect of one. So he cannot go on with the matters in respect of which he sues in the court until he has got up the money to pay for the other sentences.

In another case (20–21 Edw. I., p. 204) the prior of Dudley sues the bishop of Worcester

for deforcing him of a presentation to a living. The bishop replies that the prior was excommunicated by him, and produces the letter of the bishop's officer to that effect. To which the prior answers truly that by such means the bishop, who is a party to the plea, could seize a hundred advowsons.

The litigation over advowsons is perpetual. It shows us claims for presentation to half a church (32 Edw. I., p. 34), for advowson or tithes of two parts of a chapel (33–35 Edw. I., p. 4), and for the rent of a church let to hire. "We tell you," says Grene (19 Edw. III., p. 402), "that J. H., against whom the writ is brought, was parson of the church at Ashwell, and that he let his church to the plaintiff and another to farm at a certain rent to be paid to him yearly." The advowson is sometimes attached to a special plot of land, *e.g.* 17 Edw. III., pp. 42, 236.

Considering that every educated man, apart from the great barons and their soldiers, professed some form of clerkship, and that the caste included the dependents on the churches and monasteries who assisted in any form of worship,—acolytes, carriers of holy water,[1] door-keepers, exorcists, readers, subdeacons, and so forth,—it is not surprising that the Year Books shows the clerk in litigation in every degree from the archbishop downwards, and his social relations in varied aspects, from the archbishop

[1] See, as to the office of carrier of holy water being a benefice, Y.B. Edw. II., vol. ii. p. 125.

of York making foreign investments of spare cash by the medium of Italian usurers (20 Edw. III., vol. ii. p. xxx), or an abbot holding lands by service of feeding poor persons (15 Edw. III., p. 449, note), to the seizure of the cattle of an abbot for refusal to pay taxes (11 Edw. III., p. 637), or the taking of altar oblations by the prior of Coventry from the poor parson as rent (20 Edw. III., vol. i. p. 66).

Whatever may have been their condition at the time of the dissolution, the monasteries are shown by the Year Books to have been very wealthy in the thirteenth and fourteenth centuries. The litigation is not by the poor parson or the poor monk as a rule, but by the great Church barons, the abbots and priors and the bishops.

We see the bishop of London with an abbot, prior, and prioress diverting the course of the river Lea (19 Edw. III., pp. 178–184 and App.), and the abbot or the prior disputing over the repair of bridges (14 Edw. III., p. 293), raising the level of a dam and so flooding another man's meadow (20 Edw. III., vol. i. p. 94), pulling down another man's dam which flooded his meadow (17 Edw. III., p. 596), surcharging (32 Edw. I., p. 42), and enclosing (Edw. II., vol. v. p. 59) the common pasture, and litigating in a very great variety of ways over communal rights and intercommoning vills and the waste as sole owner, or as joint lord with another (16 Edw. III., vol. ii. p. 163), or as donee of three sisters, co-parceners, of common pasture

(16 Edw. III., vol. i. p. 34). He is concerned as claiming rights of market (Edw. II., vol. ii. p. 71), he sues the parson for breaking fences and carrying off corn (1–2 Edw. II., p. 36).

The ordinary clerk comes before the court as a husband for whom, when charged with procuring murder, his wife sues out a writ (33 Edw. I., p. 54), as a father of children (20–21 Edw. I., p. 16), as a student at Cambridge (20 Edw. I., p. 296), as friar minor at Oxford (Edw. II., vol. ii. p. 75), as the criminous clerk whose chattels were forfeited (20 Edw. I., p. 319), as a defendant for murder (Edw. II., vol. v. p. 100), as the excommunicated parson who had tithed his corn the wrong way (33 Edw. I., p. 408). The traffic in the bones of saints appears in a case brought over two crystal phials full of precious relics (15 Edw. III., p. 261).

We see the alien priories, cells of foreign abbeys, seized into the king's lands and let out to others (17 Edw. III., pp. 14–18). They were always unpopular. They were finally seized by 1 Hen. V., c. 7, which Mr Pike thinks suggested to Henry VIII. the dissolution of the monasteries.

The abbot is seen excusing himself for non-attendance on the ground that he had been seized by robbers on the way and bound. He raised the hue and cry to the coroner and to the four adjacent vills (20–21 Edw. I., p. 116). Evidently excuses of this kind were not uncommon. When a suitor excuses himself as

having been stopped by floods, Mallore J. asks him, "What did you do when you came to the water and could not pass? Did you raise the hue and cry and the menée? For otherwise the country would have no knowledge of your hindrance" (33 Edw. I., p. 122). It is one of those human touches which one meets nowhere but in the Year Books—the tired litigant, howling by the stream which he cannot cross, conscious that there is no one within five miles who can hear him.

CHAPTER XII

THE YEAR BOOKS (*continued*)

Women as Litigants.—Another great class of persons who are very prominent in civil cases concerning land are women. Writs of dower form about the largest proportion of the cases reported. The woman appears as holding land by knight service (1–2 Edw. II., p. 137), as claiming the wardship of one holding tenements of her by knight service (1–2 Edw. II., p. 18), as claiming her right of common (*ibid.*, p. 128), as complaining in respect of her beasts tortiously taken (15 Edw. III., p. 376).

She appears as defending as reversioner where tenant for life makes default (1–2

Edw. II., p. 164), defending lands of her inheritance in husband's default (*ibid.*, p. 150), as warrantor in a suit (15 Edw. III., p. 178), claiming dower confirmed in the presence of witnesses at the church door (1–2 Edw. II., p. 145), and being sued by a debtor for lands seized by her on an execution (15 Edw. III., p. 52).

A woman brings an appeal of robbery (Edw. II., vol. v. p. 116). The defending counsel pleads that a woman cannot bring such an appeal, on the ground that "ye femmes sont chanchables de charge" (inconstant, coy, and hard to please), on which Bereford C.J. remarks, "I should advise you to find some better argument" ("dites autre jeo lou").[1] In another such appeal the defence is that she is the neif or serf of the defendant, as her father had been found by verdict to be a villein (18 Edw. III., p. 8).

She appeals a clerk for murder (Edw. II., vol. v. p. 100). But though she says that her husband was killed ten feet from the steps, she omits to say whether east or west of them, whether the sword was of iron or steel, and so forth, and in consequence is sent to prison.

We learn that Queen Matilda sat for Henry I. in person (Pref. to 16 Edw. III., vol. ii.), that it was necessary for a woman endowed of great inheritance, holder of the king, to come in person into court and give

[1] See p. 47 *supra*.

security for her marriage (14–15 Edw. III., p. 272), and that Mr Justice Stonore boarded his sisters and daughter in the nunnery at Marlow (12–13 Edw. III., pp. cxiii-cxvii and 260).

The Variety of Matters illustrated.—The Year Books throw light for us on a variety of social conditions and on many questions which have given difficulty to historians. Apart from foreign wars, it would be far easier to write from them the history of the times than from any monastic annals, though we might have to turn to these to acquaint ourselves with the daily happenings of kings and popes, with which the law does not deal.

The form in which husband and wife did homage (15 Edw. III., p. 446), the relation of the villein to the land,[1] of the manor to the vill (20–21 Edw. I., p. 24; Edw. II., vol. iii. p. 26; 14–15 Edw. III., pp. 320–22), of the lord to the waste (16 Edw. III., vol. i. pp. 24, 186, etc., and vol. ii. p. 568), the risks attending the grant of a charter to a town in opposition to the lord (16 Edw. III., vol. i. p. 108 and preface; 20 Edw. III., vol. i. p. 156, vol. ii. pp. 98–112), the difficulties attending conflicting jurisdictions (20 Edw. III., vol. i. pp. 236–56; and see preface to 14–15 Edw.

[1] *E.g.* Y.B. 21–22 Edw. I., p. 106; 30–31 Edw. I., p. 168; Edw. II., vol. ii. p. 120; 12–13 Edw. III., p. 238; 13–14 Edw. III., p. 102, and the valuable prefaces to 13–14 Edw. III. and 18–19 Edw. III. (referring to Vinogradoff, *Growth of the Manor*, pp. 344–46; *Villeinage in England*, pp. 68–76), 18–19 Edw. III., pp. 500–9, and 19 Edw. III., p. 110.

III., p. xxxi *et seq.*), franchises (15 Edw. III., pp. 104–16), the leet and smaller courts (20–21 Edw. I., pp. 158, 296), appeals from lower courts (15 Edw. III., p. 58), fairs and markets (21–22 Edw. I., p. 482; 12–13 Edw. III., p. 208), proceedings in the hustings of London (17–18 Edw. III., pp. 420–30), the formalities of taking seisin of land (20–21 Edw. I., pp. 82, 256), the property in the soil (16 Edw. III., vol. ii. p. 568), tenure by service of keeping a sea-wall in repair (15 Edw. III., p. 88), the tenure of ancient demesne (33–35 Edw. I., p. 310; 1–2 Edw. II., p. 81), corrody and putura (1–2 Edw. II., p. 4; 14 Edw. III., p. 308; 17–18 Edw. III., p. 436; 11 Edw. III., p. 269; 16 Edw. III., p. 34; 15 Edw. III., pp. 346, 302), the voidance of usury (Edw. II., vol. ii. p. 67; 15 Edw. III., p. 84, note; 20 Edw. III., vol. i. p. 320), waste (of men, 32 Edw. I., p. 112; by digging, 14 Edw. III., p. 76; 20 Edw. III., vol. i. p. 402; by burning, 19 Edw. III., pp. 194–6), the value of marriage (1–2 Edw. II., p. 188), and wardship (*ibid.*, p. 107), the relations of husband and wife (20–21 Edw. I., p. 232), divorce and bastardy (11 Edw. III., p. 481), nuisance (20–21 Edw. I., p. 224), town customs (20–21 Edw. I., p. 306), compromise of suits by fines and recoveries (12–13 Edw. III., preface, and 16 Edw. III., vol. ii., preface), a daily matter where delays were so long and dangerous, deodands (12 Rich II., p. 19), the intricacies of compurgation (20 Edw. I., p. 306; 16

Edw. III., vol. ii. pp. 24, 29), the effect of outlawry on the purchase of lands (15 Edw. III., p. 228), and all those dealings with the social fabric which are the subjects of social history, such as the right of the widow to her share in the husband's goods (17 Edw. III., p. 144), are fully illustrated in the Year Books.

They also treat of criminal matters, such as murder, robbery, and mayhem (Edw. II., vol. v. pp. 100, 116; 18–19 Edw. III., p. 8; 18 Edw. III., p. 30). In this last case, "the point was touched that in former times, and still according to the rigour of the law, though it is not now the custom, one will in this suit lose member for member," an explanation of the provision in T.A.C.N. xxxix,[2] *de mehaing*, no man or woman can make any appeal of mayhem except for their own personal maim, of which the offenders will purge themselves by ordeal of iron.

Especially noticeable are the cases dealing with the common lands, with the waste, with enclosure and improvement, with replevin and distress, and the frequent intercommoning of vills, showing the ease with which the lord of the manor, especially the monastic lord, turned to his own use the land of the community.

For instance, as showing how steadily the enclosure and approvement of waste land goes on, the prior of Wartre, in an action against the abbot of Fountains for the eighth part of

waste approved, counts that divers abbots in the times of divers kings and priors had approved to themselves divers parcels of wood and had made thereof arable land, and of moor and had made thereof meadow, and stated the number of acres with certainty (16 Edw. III., vol. i. p. 186). It is easier to understand by the Year Books how the chief merged into the lord of the manor, and why the monastic records did not notice the change.

Then, Domesday,[1] the Dialogus de Scaccario,[2] Magna Charta,[3] the Statute of Merton and Statute of Westminster 2nd, which are very fully discussed by the judges in Edw. II., vol. ii. p. 37, and the Statute of Labourers, which was evidently not a dead letter by any means (see cases in 12 Rich. II.), are subjects of discussion.

The whole administration of the law, the corruption of judges (20–21 Edw. I., p. 1; Edw. II.

[1] 33–35 Edw. I., p. 310, and preface, p. xvii. "*Hunt.* Are we of the ancient demesne or not? *Kingesham.* We will send to the Exchequer to find out in Domesday. And when this was done it was found by the Domesday that they were not of the ancient demesne." And 1–2 Edw. II., p. 81.

[2] See 14 Edw. III., preface, and Pike's *Hist. of Crime*, vol. i. pp. 453–55*.

[3] 14–15 Edw. III., p. 144. Counsel argues, a plea of land shall not be pleaded in the King's Bench, for that would be against Magna Charta, which says that Common Pleas shall not follow the Court. But the Court of Common Pleas was moved about; it was at York 12 Edw. III., and was then moved to Westminster, the Mandate expressing "et ibidem teneatur quamdiu nostræ placuerit voluntate."

vol. v. p. 175; 14–15 Edw. III., p. 258 and preface), the abuses of officials (Edw. II., vol. v. p. 63; 14–15 Edw. III., p. 319; preface to 14 Edw. III.), the jury in every aspect—the choosing (30–31 Edw. I., p. 74), challenging,[1] and penalty for threatening them (19 Edw. III., p. 452); forcing an unwilling defendant to a jury (16 Edw. III., vol. ii. pp. 24, 29, and preface); the judge's powers over them (19 Edw. III., p. 184); a jury disagreeing (19 Edw. III., pp. 488–92), making a false record (16 Edw. III., p. 62), and part bringing in a record (12 Rich. II., p. 26)—the liabilities of the sheriff, and coroners, evidence, and imprisonment, receive full notice.

It is not by any means unusual to find parties pleading as an answer to some matter of title or possession or of default that the person through whom they claim had been hanged or was in prison: *e.g.* "You by your falsity caused one who never existed *in rerum natura* to sue against us, so that we were taken, at which time while we were in prison we were non-suited" (15 Edw. III., p. 54; also *ibid.*, pp. 330, 253); or again, "The charter ought not to bar us; for at the time of its execution our ancestor was imprisoned in Newgate" (20–21

[1] 14–15 Edw. III., pp. lxiii–iv, quoting Rolls of Parl. of 15 Edw. III., p. 67, whereas persons indicted could not obtain an acquittal except by a jury composed in part of those who had indicted them, it would be well if anyone so indicted could challenge any of the indictors upon the taking of the jury for his deliverance.

Edw. I., pp. 432, 458, etc.; 21–22 Edw. I., p. 406; 30–31 Edw. I., p. 543; 18–19 Edw. III., p. 566).

When anyone once got into prison, even if there was no cause for his staying there, the technical difficulties were so many and so great that it was very unlikely that he would get out again (15 Edw. III., p. 46, especially the last words of p. 50 and pp. 54, 74).

CHAPTER XIII

THE YEAR BOOKS (*continued*)

The Editors' Prefaces.—The Year Books, both those in the Roll Series and those of the Selden Society, are so admirably edited that an immense amount of most valuable information is to be gained from the prefaces and notes to the different volumes.

The preface to 20–21 Edw. I. contains notes as to complaint against and dismissal of justices for extortion and injustice; 14 Edw. III., as to corruption by officials, and 14–15 Edw. III., the trial of Willoughby C.J. for malversation; 30–31 Edw. I., as to commencement of suit by writ; vol. i. Edw. II., as to value of Year Books; vol. ii., as to great increase of business; vol. iii., on theories of reporting; vol. iv., on narratores, counters,

sergeants-at-law, and the relations of ecclesiastics to common law courts; vol. v., a very full account of the Eyre and the proceedings at the Eyre; 11 Edw. III., on divorce and bastardy; 12–13, fines and recoveries and trial by jury; 13–14, on villeinage, and on the practice in compurgation; 14–15, on the abolition of Englishry, and an account of the confused and disputed jurisdictions, and the small authority of the king; 16, vol. i., on qualifications of jurors, charters to boroughs, guild merchants, tolls in boroughs, and use of violence in litigation; 15, a very valuable dissertation on merchet, pp. xv–xli; 16, vol. ii., on compurgation, evidence, and fines to compromise; 17–18, warranty by lord; 18–19, effect of a gift in tail male; and 19, on villeinage and on the means of delaying causes.

The Actors in the Year Books Real Characters.—But all this would be only the material afforded by an especially reliable chronicle of the daily life of the country. Beyond this, the fascination of the Year Books is that the people who are actors in the events portrayed are real people who appear before us neither as very good nor very evil, neither the saint nor the king, but just the ordinary folk who really existed.

And they speak to us in words as neither the saint nor the king ever, with the rarest exceptions, are made to speak by the monastic historians who wrote at a distant place and time. The judge scolds or chaffs the counsel

in lay language: "Leave off your noise (*lessez votre noyse*—did he mean music?) and deliver yourself from this account," per Hengham J. (33–35 Edw. I., p. 6); "That is your own foolishness," per Bereford J. (33–35 Edw. I., p. 174); "Be that as it may, you are pleading very covertly (*moult covertment*); tell us what the real facts are," per Bereford J. (Edw. II., vol. ii. p. 169); and the same judge (*ibid.*, p. 174), "The two parties are pleading about different matters." "You are talking at random" (Edw. II., vol. v. p. 119); "Now you have made a nice jangle (*vient jangle*) about nothing," per Stonore J. (16 Edw. III., vol. ii. p. 482). To a young counsel who has been rude to Willoughby, "You are as hot as if there was reason in all that you say. You must be wiser than God before you prove it" (18 Edw. III., p. 436).

Pole, counsel, arguing that the verdict had been taken out of court and not at a proper time, Scot C.J. says, "We can take a verdict by candlelight if the jury will not agree; and if the court were to move we could take the jurors about in carts with us, and so justices of assize have to do" (19 Edw. III., p. 184)—a touch which brings before us, as the counterpart to the Brehon swimming or cattle-driving or disposing equitably and speedily of many cases on the top of a high hill, the hard-riding justice on his entire horse with his greyhound at his heels, followed by a jury meek but not yet unanimous, churning through the mud

to the next assize town in a two-wheel dung-cart drawn by eight long-horned oxen.

But the judges rely a good deal on the local knowledge of the jury. More than once the judge sends for the assize, saying, "The assize will tell us all about it. Therefore to the assize" (*e.g.* 20–21 Edw. I., p. 36).

Sometimes the judges fall out with one another: when Willoughby cited a case and Scharshulle J. said, "That is not law now," Willoughby retorts, "One more wise than you adjudged it" (14–15 Edw. III., p. 114).[1] Sometimes they deal severely with counsel, as when Willoughby wishes to follow a precedent, saying, "This suit is not new in the case," Grene, a pert young counsel, apparently a rising man, as in a short time he becomes a judge, says, "Certainly it is new, for this has never been seen but in Camoys' case." Willoughby, "Camoys' case was such a case as this." Stonore J., "I am amazed that Grene makes himself out to know everything in the world, and he is only a young man" (18–19 Edw. III., p. 446), which shows that he had never heard the saying that we were not infallible, not even the youngest of us. "At what moment of time," says Bereford in a rage to Laufer (4 Edw. II., p. 134), "does your count begin, you wicked caitiff?" Laufer said no word. "I take it that you ought first to skin your writ and then to count your count."

[1] "Ces nest pas ley a ore. . . . Plus-sage que vous nest la jugea."

About this time apparently the judges were beginning to be called on to follow precedent. Grene disputing a point with him, Willoughby says, "Certainly I tell you that this is law, and always was and will be . . . whatever you may say about precedents" (*ibid.*, p. 490).

Precedent was occasionally followed, but it would not appear that any judge felt himself bound by it (see 20–21 Edw. I., p. 24; 11–12 Edw. III., p. 613; 12–13 Edw. III., p. 360; 13 Edw. III., p. 52).

Ley est resoun.—The most interesting case bearing on precedent occurs in 18–19 Edw. III., pp. 376–8. Shareshulle J. had quoted as precedent a judgment of Bereford and Herle, but had demurred to adopting it, saying, "No precedent (*ensample*) is of such force come resoun." Thorpe says to the court, "I think you will do as other judges have done in the same case, for otherwise we do not know what the law is." Hillary J., "Volonte des Justices." "Nanyl," says Stonore J., "ley est resoun."

"Resoun" is translated by Mr Pike as that which is right, following the analogy of "vous avez raison." I dare not differ from such a great authority, but I would point out that the word was used in the English writers of the time as reckoning, taking account, to which law, the art of thinking out matters, corresponds: *e.g.* Wycliffe, St Matthew xviii. 23, "Therefore the kingdom of heuenes is lickened to a man kyng that would putte

resoun with his seruantis"; xii. 36, "For whi of every ydel word that men speken, they shul yelde resoun therof in the day of dome." In 15 Edw. III., p. 126, Mowbray, one of the counsel, says, "Lei deit acorder a resoun et oster meschief si le reverse neit este use per lei."

The interest of the passage, however, lies in this, that although Hillary lays down that Volonte des Justices is law, neither of the judges suggests, as they would surely have done two centuries later, that the law was the will of the king, or two centuries earlier, that it was the will of the people. Both Hillary and Stonore are right in their definitions. The law was being made by the judges as oral declaration.

They seem to have been able men, much interested in the law game, and indifferent honest as times went. They were so paid by their employer as to encourage malversation, so we need not be surprised to hear of the king being forced to dismiss and to prosecute his judges for dishonest practices in office, especially as he himself sometimes interfered to wrest the law to his authority.

The trial of Willoughby C.J., reported in Y.B. 14–15 Edw. III., p. 258, is remarkable in more than one way. He is charged that, being left as the king's lieutenant when the king went over the sea, "he had then perverted and sold the laws as if they had been oxen or cows, whereof by clamour of the people about

the same matter was shown to the king."[1] Willoughby objecting that, before cognisance can be taken of the matter, the king must be informed by indictment or by suit of party with pledges to prosecute, Parving J. replies, "He is informed by clamour of the people."

Among the charges were that he had taken bribes to lessen fines imposed upon people indicted for breaches of forest law, to which he replies that the people had remained a long time in custody and had purchased their deliverance; that he had procured people to be indicted, and had then taken beasts and other gifts for their deliverance; and that he had taken ten marks from a man to reverse a judgment, and then twenty marks from another to affirm it, and did affirm it (p. 260).

In all times when justice is sold, denied, and delayed, whether for ready cash or by means of excessive fees or fines, the only means of ensuring the honesty of the judge is to make it worth his while to be honest, and to exclude from office anyone whose former reputation in affairs of money was not absolutely correct.

The Reporter.—It is the still small voice of the reporter which connects for us the oral tradition of the Year Books with the written manuscript. Lord Coke took into his head the idea that the reporter was an appointed official, *quod mirum est*, as the reporter would have said. He has all the freedom of an

[1] Mr Pike's translation; "par clamour de poeple pardecea et de la chose est monstre a Roi."

independent commentator, criticising alike the judge and the counsel, as the Brehon of the Irish laws does those of his time.

Where the judge allows a demand partly on a written obligation and partly on a verbal claim for debt, the reporter unburdens himself: "But the decision seems bad. It would seem that in this case the writ ought to have been quashed; and this is the truth" (20–21 Edw. I., p. 66). "It was wrongly adjudged . . . he was wrong in answering by award of the justice . . . therefore the justice's award was apparently erroneous" (*ibid.*, p. 78). "Tamen query unde legem (12 Rich. II., p. 40), quod mirum est (13–14 Edw. III., p. 6), quod mirum est car ceo nest pas plee" (16 Edw. III., vol. i. p. 243), have no sound of the official reporter, nor have his references to counsel

He quotes an opinion of Lowther, one of the counsel, beginning, "It was said by Lowther . . . ," and ending, "which is false" (20–21 Edw. I., p. 158). But apparently counsel's word as to facts appears to have been taken even in those days (1292), as if evidence on oath (*ibid.*, p. 64). The reporter comments on the wisdom of the pleas set up by counsel. In a case where putura was claimed for fodder for a horse: "Quære, etc., I think the plaint would have been better for a profit, a prendre, or a corrody" (11 Edw. III., p. 271).

Occasionally he notes conclusions arising from the case (generally not reported) such as appear to establish any principle of law,

frequently on the authority not of the judge but of counsel (15 Edw. III., p. 180: "Note that according to some of the clerks"), sometimes apparently on his own authority. Where John is excused from attending a leet court on the ground that he was a clerk studying at the schools at Cambridge, the reporter adds that it would have been so if John had not been a student but only a clerk with benefit of clergy (20–21 Edw. I., p. 296).

The mistakes which the reporter occasionally makes, such as naming the abbot (*labbe*) of Conesby for prior of Conishead (12–13 Edw. III., p. 74), militate against his official character; nor would any official reporter have been so foolhardy as to make the following notes:— "Robert, pay your fine to the king. Note. The justices did this rather for the king's profit than in accordance with law; for they gave this decision *in terrorem*" (30–31 Edw. I., p. 506), which shows how unfair it was of Edward III. to prosecute his Chief Justice by clamour of the people; or where Mr Justice Stonore asks, "Where is the jury?" the reporter adding, "and he said that because he wished that the damages for the rescue and those for the battery should be severed" (18 Edw. III., p. 394). Another report of this case in the Harleian MS. does not give this remark.

Only very occasionally does he quote a precedent, as where he quotes, in 17 Edw. III., p. 38, a case in Y.B. 6 Edw. III. on process in Statute merchant.

As there was no law that a judge should follow precedents, and no public for whom they would be of interest, there was no reason why the reporter should notice any cases except those which were out of the common.

Speaking of the discrepancies between the Year Books and the Records, Mr Pike says (20 Edw. III., vol. ii. p. xlvi), "The reporter had an eye not to the everyday and the obvious, but to the unusual and the difficult." When he reported a case he did so for his own interest and advantage, most probably from memory after discussion with friends. His reports were not cited as precedents; when precedents were brought up in court, the judges did not necessarily follow them; it is unlikely that in any case we have any original manuscript of a report taken in court, or in fact any original manuscript at all. The Year Books are notes of oral proceedings taken down from memory.

We may here take leave of the characters in the Year Books as of witnesses no longer required, in the words of the learned Mr Justice Shareshulle (Y.B. 18 Edw. III., p. 13): "Alez a Dieu vous vileyn."

If reading this account of the manifold activities of the king's courts whether at Westminster or in the wanderings of the eyres, of which I have touched only slightly on one side, should give the impression of a kingdom at peace and under full control of the law, a reader would do well to refer to Mr

Pike's account of the conditions of the country in 1348. "Scenes of violence were common throughout the country, and the forgery of documents and seals quite an ordinary event. Lawlessness was prevalent to a degree which would be incredible if it were not established beyond all doubt by the contemporary records. In the year 1348, only two years after the last of the Year Books published in the present volume (20 Edw. III., vol. ii.), there was not that security for life and property which the elaborate structure of the courts of justice might seem to suggest. Murder was rife in all parts of the land, and robbery on the highways was an everyday occurrence. In many places there was organised brigandage. A town might be invaded and plundered in the midst of a fair. In the country, a park or chace might be overrun by a band who would kill the cattle and the game, cut down the timber, and carry off the spoil. False coin was imported and still more was manufactured. Prosecutors, suitors, and jurors were intimidated, and the collection of taxes not infrequently met with armed resistance. There was much dishonesty among traders of all kinds, and they did not even scruple to assist the king's enemies with arms and provisions." A perusal of the Paston letters will show a very similar condition of affairs a hundred years later.

If this was so in England, where the courts of law had much power and were well organised,

much more was it the case in the remoter parts in the marches on the borders of Wales and Scotland, where the law was weak and disorder always prevalent.

To carry it down 240 years from the time of Mr Pike's account, a very amusing account of a border affray is given in the *Annals of Teviotdale* (edited by the Rev. James Morton, 1832, p. 44), which took place at Jedburgh in 1575, on the occasion of a meeting held for redress of grievances.

The proceedings of the Border parliament, the judicial assembly, upon some sharp words of dispute between the wardens developed into a pitched battle between the English and Scots, as if it had been a suit at the Law Hill of an Icelandic Thing. Each side seized the other's horses; the Liddesdale men took the opportunity to plunder the booths of the merchants who had come to chaffer; and finally, when the Scots were getting the worst of the battle, the burgesses of Jedburgh, raising the cry, "A Jedworth! A Jedworth!" marched out of the town with drums beating and colours flying, and drove the English officers of the law over the border.

These aspects of history, as well as the proceedings in parliaments and law courts, assist us to form an appreciation of the responsibilities which rested on the mediæval ruler.

PART III

CHAPTER XIV

REDUCTION INTO WRITING

It is not necessary to suppose that when men first put down written matter on sheepskin they did so from any belief in the superiority of writing over the spoken word. The superiority, so long as society rested wholly on force, was with the oral tradition. The memory, in an age when violence was a daily experience, was a far safer storehouse for the things to be remembered than the wooden chests or any other unsafe receptacle in which the parchments could be kept. Fire, when the smoke went out through the middle of the thatched roof of a wooden building,—when, there being no matches, fire was carried in the hand or on a wooden shovel, was a daily occurrence, an hourly danger. To the risks of fire and water was added the fading of the letters on the skin. The MSS. of the Sagas have been for the most part lost by their use as leather for shoe-making in Iceland. The memory was in every respect a safer place.

Besides, as long as society was stationary and the means of production shared by the community, there was nothing to be gained by reducing customs to writing, for everyone knew them ; a general declaration to the people

was in every way better. The only history to be told or to be cared for was the story of the great deeds of the past; and men's memories were so long that, if a man took it into his head to write down the events of past years, he was only writing of what was common knowledge to all.

What it means.—Writing begins with the coming of the missionaries of the Church of Rome. When we first begin to hear of written documents side by side with oral tradition it tells us two things—that the reign of perpetual violence was passing away, and that Christianity was superseding paganism. Oral tradition did not cease; it went on in the centuries side by side with the parchment record, the memory being still the safest place in which to store facts, except where the belief in the powers of the Roman missionary checked the savagery of the fighting man.

For a very long while the use of writing confined itself to two things, the multiplication of MSS. of the "religion of a book" which replaced paganism, and the recording of matters of exception to the general rules of the social state which affected the body of men who had broken in upon the society of kinsmen, claiming no kinship, not seeking to be members of the community, but being a separate community in themselves. Augustine, Paulinus, Mungo, Aidan, Patrick, all the missionary bodies, had no rights in the community, unless in those parts where

the tribal system was so little superseded that they formed a tribe of the saint within the tribe. In all parts they had only such rights as were granted to them by the community, rights which, as exceptions to the general unwritten rule, it was very natural that they should at once reduce to the writing at which they were expert. The franchises of the Church come from the king's grant. Men of religion, says Scrope J. (Y.B. Edw. II., vol. ii. p. 73), take nothing by conquest; and Derworthy J. points out that for churchmen the grant must be always from the king, so prescription will not run against them (Y.B. 16 Edw. III., vol. ii. p. 214).

Violence was ceasing, but it had not ceased. For long centuries the only place in which men could study and carry on the arts of life was the monastery; the only place where it was safe to store facts not contained in the memory was where the belief in unseen powers checked violence and plunder.

It is easy to laugh at the childish superstition of those early days which surrounded the monasteries with local saints extending their protection, and working miracles on opportune occasions on very commonplace things. The unarmed man in the monastery would very soon have been swept out of existence by the brute force around him, if he had not been able to create a belief in the sanctity of everything with which he was concerned.

Especially the mysterious parchment on

which was written the divine word was under the ghostly protection, it attained miraculous powers which impressed the man who could not read. In the Annals of Clonmacnois Mac-Geoghagan tells that the Book of Durrow, one of the very exquisite ancient Irish MSS. of Columba, was, like others written by that saint, believed to be impervious to water, and that he had seen "the ignorant man that had the same in his custody, when sickness came on cattle, for their remedies put water on the book and suffer it to remain thereon," a kind of baptism of the cattle in the Holy Book.

The safety of the monastery, the sanctity of its surroundings, threw into the hands of the monks the whole business of the production of MS. Except for any writing bearing on their position in the community, of which we have no very early remains in evidence, all early MSS. were portions of Scripture or stories of saintly lives or discourses on religious subjects. The monk was the guardian of the written word. In those days, at least in Ireland, the production of MSS. does not seem to have been a commercial business, but a labour of love by the men whose profession was to teach and preach the Gospel, and to exercise themselves in devotion.

The Original MS.—If a man in those early days wrote and illustrated a MS., unless he was of a generous turn of mind, or had a spare piece of parchment, or succumbed to an appeal to his vanity and made a copy for a friend, the

MS. remained the only MS., his property. When Columba borrowed a MS. from another saint and slyly made a copy of it, the owner cited him before the king of Ireland at law, who gave judgment against Columba in the sententious epigram, "La gach boin a boinin acus le gach leabhar a leabhran" ("To every cow belongs her calf, to every book its copy"). Columba went north to his kinsmen in Tirconnell, and led the men of Ulster against the judgment-giving king, utterly routing his army. The disputed MS., which was afterwards retained by Columba, was called the Cathach or Battle Psalter, and was carried in battle by the clan of the O'Donnells, as an assistance to victory, down to the end of the fifteenth century.

Such MSS. as these, of which the original owners were so jealous, were not numerous. They were most beautiful works of art, illuminated with the most wonderful taste and delicacy of handiwork. Ireland has pre-eminence in this class of work, the extraordinary beauty and the luxuriant illumination of the MSS. of past times, from the fifth century downwards, deposited in the libraries in Dublin, far excelling any other specimens. One in particular, the Book of Kells, a MS. of the Gospels in Latin, is well known for the extraordinarily elaborate ornamentation. Either the men of those days had stronger eyes than ours, or far greater patience, to work out the minute hair-lines of colour which form the intricate patterns of these illustrated books.

Copying and Editing MSS. — But there would be few MSS. of such value as to be worth the jealousy which denied the right of reproduction. Except for these creations of beauty, the MSS. were copied and produced in every monastery. It soon became, at least in England, a commercial business. Every monastery had its scriptorium, in which MSS. were written and illuminated, where pupils were trained in the art. The monks in time took into their hands all trades, all arts, all professions. But, until printing put an end to MSS. on parchment except for legal documents, the one leading business of the monastery was making and copying MSS.

The writing, as I have pointed out, in the earlier times was either of religious matter or of grants which formed exceptions to the customary law. The writing of Annals and Chronicles does not begin until the Roman influence has consolidated the tribes into some sort of a nation. Even then the entries are very sparse indeed, and concern almost entirely the monastery or the matters of religion in which they were concerned.

We come here to one of the greatest difficulties connected with the authoritative value of mediæval MSS. Many copies of any work of interest were made in different monasteries; there was jealousy between the monasteries as to the possession and authorship of such works. But there was nothing in the dense originality of those days to prevent each copyist from

making, as he went, any alterations or additions to the MS. which pleased him or seemed to be likely to be of interest to the people of his district. He could modify or strengthen the violence of the expressions.[1]

Or the copyist could introduce new facts or omit facts. He could alter legal customs, if they happened to differ in his neighbourhood from those recorded; the events which appeared perilous at St Albans would be of little moment at Worcester or Durham; the character of the king or other man would vary as he had been niggardly or generous of other people's goods to the editor. He made what was very often practically a new work. But the new work still went under the name of the man to whom it was convenient to attribute the work. The supposed author might very well be a copyist, or the abbot of the monastery which possessed it, or any other fictitious person. Such a habit had the further great disadvantage that it led easily to forgery. We not only never can be sure that we have the original MS., but we can never be sure that the MS. is an exact copy of any original. As we

[1] As, *e.g.*, Matthew Paris, re-editing Roger of Wendover's Chronicle as his history (R.S., No. 57, vol. ii. p. 635), adds abusive epithets to the names of the leaders of the royal forces. He adds to the name of Faukes de Breauté, "sine visceribus misericordiæ," and to the name of Walter Bunc, leader of the mercenaries, "sicarius et vir sanguinum cum Flandrensibus suis spurcissimis et ignobilibus omni genere facinorum commaculatis." Roger of Wendover did not say this.

seldom know any particulars about the supposed first author, or anything at all of the copyist, we have only in almost every MS. a compilation of flying rumours or customs carried down in the memory made by a person unknown, and altered according to circumstances. This applies to all the mediæval chronicles of any part of the islands.

The writing of legal customs begins apparently early, and it is in England at least the monk who has the writing and editing of these, judging by the large space in the early laws devoted to Church matters.

The Writing of Charters.—The writing of legal documents must also have begun very early. Men were grateful to the Church for the benefits, moral and material, which the man of peace had conferred on society, the crops of corn which lessened the dread of famine, the assistance which their care of roads and bridges gave to those responsible for their upkeep (see Jusserand's *English Wayfaring Life in the Middle Ages*, p. 38 *et seq.*), their industry in teaching the arts which in the times of war other men could not practise. They showed their gratitude by giving to the Church, which stood outside the community, gifts of slices both of the common lands and of land belonging to individuals, and they invested them with a number of miscellaneous privileges which attached to the lands, or which were of value in themselves.

In the early days the monasteries were poor.

It was not until the twelfth century that they began to become really wealthy and powerful corporations. Where the grant did not express the communal rights involved (and early charters were very short), it was natural that the hungry grantee should try to include in the grant all the pertinents, the matters which under customary law might pass without any need of written expression.

To the grant of a few acres, maybe of waste land, the writer added all the remote possibilities which could result from the grant, rights of hunting, of fishing, of milling, the ferries, the salt works, the smithy, the brewhouse, the tolls and customs, the taking of peats and broom, the right to hang and drown, and so forth. The parchment conveyances and legal documents of later times derive their extreme length and their unnecessary repetitions from the desire of the monks of ages long past to include in the gift all profitable accessories.

Frequently, however, especially in later days, as they became longer and more diffuse, the charters expressly included a number of miscellaneous gifts. It is not surprising that the possessions of the Church grew with enormous rapidity from the acquisition of many small bits of things, each carrying with it some further right attached to the collection or some opening for future enlargement which the king and, in imitation of the king, all the lesser chiefs threw to the men of the Church.

How miscellaneous such gifts were may be seen from any charter in any part of the islands in those days. For instance, in 1150 David I. of Scotland grants to the monks of Dunfermline a confirmation of the grants formerly made to them (Lawrie's *Scottish Charters*, No. ccix.), including mansuræ (houses in burghs), two churches, a ploughgate (about 104 acres) of land; tithe of various legal dues; fishing; tithe of pleas; tithe of the produce of all game taken between Lammermoor and the Tay; half of the hides and fat and lard of all beasts killed for feasts in Stirling and between Forth and Tay; timber from the king's wood for firing and building; all offerings at the great altar; every seventh seal taken at Kinghorn; tithes of salt and iron brought to Dunfermline for the king's use; a tithe of his unbroken mares in Fife and Fotherif; exemption from toll on all occasions; five marks of silver from the first ships which come to Stirling or to Perth; the passage and boat of Inverkeithing, excepting free passage for persons on court business; freedom from authority, lay and ecclesiastical, and from court dues.

It would most likely fall on the monastery to see that the roads and bridges and ferries were kept in repair, so that they might enjoy their gifts, and that the course of the river was clear, to prevent the boats sticking in the mud on their way to Perth or Stirling.

The men of the monastery in the first

instance lived on this miscellany of odd things pared from the wealth of the community, and they repaid it fully by prayer and by advancing the science of living. But such a system undoubtedly led to a great deal of forgery of charters, which, in view of the great success of the forged Decretals, is hardly surprising, forgery which led to doubt of the genuineness of the earlier MSS. This partly accounts for the spite of the common lawyers against the Church, to which Bereford gives vent in 4 Edw. II., p. 69: "The men of Holy Church have a wonderful way. If they can get a foot on to a man's land they will have their whole body there." And he adds, referring to the case before him, possibly not without some note of admiration: "pur l'amour de Dieu l'evesqe est un prudhomme."

The Writing of Chronicles.—One cannot be surprised that the monks spoke ill of the men who found other uses for their money. When after his coronation John came to the monastery of St Edmund's at Bury, "we indeed," says Jocelyn, "believed that he was come to make some offering of some great matter; but all he offered was one silken cloth, which his servants had borrowed from our sacrist, and to this day have not paid for."

As the copying of MSS. grew to be a great commercial business, each monastery set up its historian, who kept a record for the events which concerned the monastery, and such

outside events as rumour carried to them. As all ships were laid up in the winter months, and communication with the east or north suspended, the particulars which came through to the monastery must have come from pilgrims who had heard rumours on their way home.

While the copying and editing of MSS. thus became a great commercial industry in the English and East Scottish monasteries, in the rest of the islands the oral tradition, the story-teller, lasted for many generations. The Chronicles and Annals of all parts continue to enlarge in view, but still everything centres round the affairs of the monastery and the Church. Rome plays a larger part, communication becomes easier, the outlook of affairs widens. But still until the twelfth century no one wrote history in our sense of the word, though William of Malmesbury and others might call their books history in imitation of the Roman model.

They wrote of the affairs of the Church, whether in the East or in Rome or at home, and of their own affairs in the monastery, and of famines and storms and miraculous portents, and in the times of the Scandinavian invasions of the crimes of the Northmen, and they wrote as the times went on more and more as a commercial business, for money, not with any view of informing the world. Why else should they write?

In days when *stultiloquium* was an offence

liable to heavy punishment, if the rumour fled round their world and came to the ears of the person affected, it was better in every way for men whose business was writing to put down on parchment their estimates of character and the rumours which came to them to be discussed in the monastery or to be circulated among the fraternity at large. It is in the twelfth century that the change from these conditions comes.

CHAPTER XV

THE LITERARY OUTBURST OF THE TWELFTH CENTURY

The twelfth century saw a most extraordinary activity in all forms of thought and expression. So far from being an age of faith, it was a revolutionary time, when men turned over all their previous convictions and revised them. Every theory, every belief, on which society in any of its aspects rested, was questioned and closely examined.

The really great minds of the Church, men whose study and whose use of writing had led them to think over the faiths of Christianity as well as accepting them, had tried in former generations to reconcile the doctrines of the Church with the objections to them of human

reason. John Scotus Erigena in the ninth and Anselm at the end of the eleventh century had exercised eminently subtle minds on problems of philosophy and religion. But the problems discussed by a few of the greatest men came only into prominence as subjects of investigation by the many when the Crusades, showing the West European world the gorgeous East at a closer view, and a great Eastern civilisation beyond, which hitherto they had been taught to despise, called on men to examine into their own faith and all the human society which depended on their faith. The Crusades brought for a moment a great unity of Christendom, elevating the papacy, the centre round which the Crusades moved, to a giddy height as the Eastern patriarchates decayed, and they opened up a great literature of the thoughts of the past enshrined in written MSS. They not only taught men to think, but they encouraged the use of writing.

So far as the subject of history was concerned, the result was the reduction into writing of all sorts of matter which bore on the past, not merely theological disputations, but accounts of events, bodies of custom, legends of all descriptions. In fact, what we may call "history" in the modern sense of criticism and abuse of rulers was for the first time since Cæsar's invasion being written in the islands.

All or almost all this historical matter, how-

ever, was not in any sense original as regards the past, but was enlargement and embroidery on a stock authority, the sparse chronicle of former ages, which gave facts on which the historian could exercise his literary imagination.

Bede, Tighernach, Marianus Scotus, Asser, the Saxon Chronicle, probably Are and Soemund Frode, were the skeletons on which the twelfth- and thirteenth-century historians put flesh, in the style of Rubens. Sometimes the Chronicle was merely a brilliant embroidery on the bare bones, sometimes it professed to be the work of a man of former times, sometimes it is expressed to be the writer's own compilation from a number of previous writers. In every case the only facts before the date when the writer begins his MS., which can be in any way relied on, are those related in the stock authority, as any former writers from whom the twelfth-century historian took facts embroidered on the same stock authority. I have called attention to one instance of such use in my *First Twelve Centuries* (p. xli), in the accounts of the massacre of St Brice.

Most of these so-called historians are intolerably dull compilations, simply wrapping up the minute fact in very grandiloquent language, and bringing forward those features which affected the position of the Church. But there were other writers who were more independent, who even dared to write away from the stock authority and indulged in original fiction.

The Archdeacon. — These men were frequently archdeacons, who, being the men of business of the monastery, travelled much, were brought in contact with laymen in all sorts of business relations, and were in a position to hear news which was denied to the sedentary occupant of the monastery. They were often sons or nephews of the bishops. Henry of Huntingdon in the eleventh and Ralph de Diceto, afterwards dean of St Paul's, in the twelfth century are examples of the class.

Prominent among the more original writers of this age are three half-Welsh archdeacons, Walter Mapes archdeacon of Oxford, Geoffrey archdeacon of Monmouth, and Giraldus the Welshman (Cambrensis) archdeacon of Brecknock. Each of them contributes racy and original matter to our stock of knowledge of their times. Walter Mapes gives sarcastic comments on the court life of the times of Henry II., Geoffrey creates for us the ideal Arthur and builds up an imaginary British empire of the Welsh which seems to have borne fruit in John's time,[1] and Giraldus, an able diplomatist of no mean order, trusted by Henry and his sons with various important missions, wrote on the events of his own life and on various other most interesting subjects both in Ireland and Wales with all the freedom

[1] When Arthur "subito evanuit, Britones Arthurum antiquum in isti resuscitatum impudenter et imprudenter jactitabant."

and vanity and prejudice of the monastic man of business of his time.

There is some similarity between these men and the special correspondents, the men who write special articles for newspapers in our time. Giraldus in particular has been alternately abused as a liar and as credulous because he picked up any good story which he found going about and told it in a racy manner, regardless of truth, so long as it would amuse; William of Malmesbury, a very much duller writer, a Puritan, who is always protesting that he cannot tell a lie, is believed and considered an authority because of his protests.

These critics of history never can understand that a man may be absolutely regardless of truth in matters which belong to the realm of fancy, while, like a special correspondent of to-day, he *may* be most accurate in stating facts of importance which bear on matters in which accuracy is of value. If it were not for our intolerable conceit we should see this.

For instance, Giraldus, in an account of an itinerary through Wales of Archbishop Baldwin in 1188, preaching the Crusade, a book dedicated to Stephen Langton, the famous Archbishop of Canterbury, tells of a saintly staff of St Cyric, a saint of the seventh century in Wales, a staff covered on all sides with gold and silver, and having the miraculous power of curing glandular swellings on payment of a penny. He says that a patient paying only a halfpenny, the swelling subsided on one side only; another

promising a penny, the swelling subsided but came back on non-payment, and the man had to pay threepence to get rid of it. Neither Giraldus nor Stephen Langton, men with most acute minds, is likely to have believed such fables. It is hardly sensible to call him credulous because he amused the men of his age with what was to them a good story.

I am reminded of a paragraph in a London daily paper in the dull month of August 1910. The correspondent related as fact a story of an election in a town in Iceland to decide whether the town should be lit by electricity or gas. All the men, said the correspondent, voted for electricity, all the women for gas that they might cook with it; the women and the men were equal in number, and the mayor decided the question by voting with the women. I do not know whether there are any towns in Iceland, or how far this story may have foundation in fact. But in any event we need not call this correspondent a liar or credulous. He provided "good copy" in a dull season. The season of Giraldus and William of Malmesbury was always August.

The authors who permit themselves the danger of originality weave endless legends from the wonders of natural history, the misconceptions of the habits of creatures and human races with which the Crusades had newly acquainted them, and the results of the stories brought home from the East by men

who had not entirely lost a sense of humour or the habit of imaginative enlargement.

They tell of the disdainful and discontented camel, the rhinoceros allured by love of virgins, the badger which had the legs longer on one side that he might walk in the ruts of the road, the beaver's tail of which Giraldus sarcastically remarks, "Great and religious persons in times of fasting eat the tails of this fish-like animal."

If anyone objected to any of these efforts of the imagination of the mediæval historian, he would be likely to be met with the reputed answer of Augustine to one who asked him, What was God doing before He created the world? He made hell for those who ask foolish questions. Hell was a frequent subject of amusement for the monastic historian.

But they were not all legends that the historians told. Sir John Maundeville (they say that he never existed, but that does not matter any more than with Benedict of Peterborough, one of our most reliable historians) tells us of Cairo: "There is a Common House in that City that is all full of small Furnaces, and thither bring Women of the Town their Eggs of Hens, of Geese and of Ducks to be put into those Furnaces." And they cover them with Heat of Horse Dung, etc. "And at the end of three Weeks or of a Month, they come again and take their Chickens." A public incubator in Cairo in the fourteenth century!

The summary of all this is that we have to

take the monastic chronicler of the twelfth and succeeding centuries as we take the correspondent of the present day. He gives a great mass of information, and he leaves it to our common sense as *chiffonniers* to sift it. If we have not got any common sense, we make a false use of it, or no use at all.

At the present day, if we find a statement in some daily paper which we distrust, we correct it from another paper or from some other source or from good personal common sense. If we wish to make any sensible use of the monastic chronicle, we must use the same check from common sense and other sources. It does not matter whether we are considering the value of Matthew Paris in his heyday of reputation as a serious chronicler, or Giraldus in his most irresponsible moments of gratuitous fiction; we cannot accept their conclusions without considering them.

CHAPTER XVI

THE INFLUENCE OF THE MONASTIC HISTORIANS

Their Influence on their own Age.—What effect had these historians on their own age as authorities for the history of their times? I should not ask so foolish a question if they had not been so accepted in times later.

Giraldus might go and read his books to the young men at Oxford, or amuse Henry with his account of the encounter with the bishop of St Asaph. But apart from any authority of personal experience which he might have as a member of the expedition to Ireland, or as the guide of Archbishop Baldwin in Wales, no man who was likely to hear his MS. read would be ignorant of his kinship with the Fitzgeralds or his ambition that Wales should be independent of Canterbury. History which takes note of theories of government was not born. Men who read *De Instructione Principum* would recognise in it the spiteful reply of the old savant to the neglect of his claims by Henry and his sons. No man in those days was so foolish as to make the whole world revolve round one human character.

The monastic historians of the twelth and thirteenth centuries wrote for bread, and in the hope of patronage. When they had no response and saw no reward in sight from the king whose promises they had sung, they turned and tore him.

If we wish to judge of the influence which they had on their times, we must mark what influence the most brilliant correspondent now, in an age when men spend a great part of their time in idle reading, has on our times. The few who read their works or heard of them would judge their value by the existing conditions which they knew from oral sources.

Their Influence on our Age.—Unfortun-

ately, though there is no reason to believe that any of the chroniclers ever influenced the events or the characters of their own time, they have had a great and for the most part a very evil influence on ours. The exaggerated language of evil speaking which they were in the habit of using of all persons in authority has been accepted by English historians from the seventeenth century onwards as tending to support certain theories of what is called constitutional history, the study as to when and how far, under a government which rests as it does in no other country on unwritten foundations constantly modified, it is to the advantage of society for the individual to refuse obedience to the State.

I will take some illustrations of this use from the most learned and most considered writers of our time.

Walter of Coventry and Bishop Stubbs.— For the last few years of John's reign the chain of responsible chroniclers, who had carried on from one to another an account of events previously, and who continued the accounts subsequently, is broken. Hoveden, Ralph de Diceto, Gervase of Canterbury, Benedict of Peterborough, William of Newbury, and others had ceased, and Roger of Wendover and Matthew Paris were not contemporary. We have no contemporary writer of any note for these very interesting years, unless it be a MS. called the *Memorials* of Walter of Coventry. The MS. has a very instructive history.

Someone, possibly a copyist, got hold of or compiled a MS. and called it the *Memorials* of Walter of Coventry. There is no evidence that anything was known of it in John's reign or for a long time afterwards. But in the sixteenth century Leland, a most learned antiquary, picked it up somewhere, and after the manner of the men of his day wrote an account of the author. The stories told by him and his successors are worth quoting as typical of the way in which history has been written. "Walter Coventuensis," he says,[1] "a man now dignified by age and much experience of affairs, wishing to make the fame of his name by some significant memorial not only illustrious but also most extensive or perpetual, applied his mind to writing. . . . Accordingly with a high courage he attempted a history. . . . Illustrious however as the man was, he wanted one thing, . . . in eloquence he was not unfrequently in default, etc., etc.," of which Bishop Stubbs quietly remarks that this was Leland's way of stating that he knew nothing at all of Walter of Coventry.

Bishop Bale, another antiquary, follows Leland, and knowing less gives closer particulars. Walter, he says, born and educated in Coventry in the county of Warwick, spent on literature very sedulous labour at Oxford. Pits follows Bale and,

[1] I quote from Bishop Stubbs' Introduction to the first volume of Walter of Coventry in the Rolls Series.

misunderstanding him, makes Walter born "of honest parents" in Warwick instead of Coventry, and passes him through the course of studies at Oxford with satisfaction. A long list of distinguished critics and antiquarians, each adding some touch of solemn fancy, carry the story down. Then in the eighteenth century comes a learned German, in days when Germans were learned, one Caspar Oudinus, and sweeps the whole edifice away, leaving not a wrack behind.

Then in the latter half of the nineteenth century comes Bishop Stubbs with his absolutely destructive criticism. He shows that Walter of Coventry was not contemporary, but "flourished" up to 1293, seventy-eight years after John's death; that nothing whatever is known of him, unless, from local indications in the book, he was connected with the diocese of York.

Of the *Memorials* he says: "The book itself is one on which its creator has bestowed very, very little more than manual labour"; it is a compilation from Geoffrey of Monmouth's *British History*, beginning with Brutus, the son of Æneas, and other works, followed by condensations and extracts from Marianus Scotus, Florence, Henry of Huntingdon, Benedict of Peterborough, Roger of Hoveden, and an anonymous continuator, but it was not drawn immediately from them. "It is an abridgement of an abridgement, a compilation

from a compilation, which last is drawn from the originals."

The anonymous contributor he identifies with a chronicle of the monastery of Barnwell, near Cambridge, which contained a series of Annals from the Incarnation to 1225, with some scanty and valueless notes of continuation down to 1309.

"Whether this Barnwell Chronicle is an original or only a local version of a book of annals widely diffused in the fen counties, I cannot say." Walter did not use either of the known MSS. of this Barnwell Chronicle.

"There are not, I think I may safely say, a hundred words in the book of which Walter can claim to be the original composer."

He traces the five steps which lead to the formation of the MSS., and he decides that this compilation from a compilation is valuable, and that the writer was "very patriotic."

Such a laying bare of the grievous faults of other critics would, one would have supposed, have given this great historian pause in passing equally reckless commentary on the characters dealt with by the records which he dissects, but this is not the case.

In the preface to the first volume he utterly smashes the edifice built by the critics of the sixteenth and seventeenth centuries over Walter of Coventry; it is a masterpiece of critical examination. The preface to the second volume is a faithful following of the style of the twelfth-century chronicler, an

attempt by Bishop Stubbs to build up what is called a character of both Henry and John out of the odd bits. Out of these he draws what he calls "a more probable theory of the man and of his work on the age and nation."

According to this theory of Henry, "his moral character, his self-will and self-indulgence, his licentious habits, his paroxysms of rage, his covetousness, faithlessness and cruelty, did not come into any violent collision with his political schemes."

He descends to personal particulars which could have no influence in Henry's age and nation; "he transacted all business standing, greatly to the detriment of his legs."

His character of John is as spiteful and as absolutely unsupported by evidence as anything which has been written since Giraldus in his old age and days of disillusion, having bid too low at the auction, calls Henry "justitiæ venditor et dilator," and the bankrupt John "longe atrocius cæteris tyrannis."

The epithets used by Bishop Stubbs in drawing these characters are accompanied for the most part not by any facts but by a few words drawn, with the exception of Giraldus, from Matthew Paris or from writers of the fourteenth century, like Wykes and Matthew of Westminster.

The writers of John's own time do not use such abusive language; the great critic suggests that in his lifetime they were afraid. Those who wrote soon after his death are

equally moderate; he suggests that the truth would have touched the honour of noble families.

The care is extraordinary with which Bishop Stubbs collects here a word and there a word from these non-contemporary annalists in support of the characters which he has made up—here an evil epithet, there savage vituperation, "insatiabilis avaritia" (Matthew of Westminster), "proterva obstinacia" (Wykes), etc., etc—each passage torn from its context where, beyond the virulence of disappointment or the desire of enforcing the moral lesson, there is any context.

Where the annalist does not bend to the desired abuse, the Bishop says, "only an occasional adverb, *dolose*, *crudeliter*, or *ignaviter*, shows what he thought."

He points out that the circumstantial charges are made by Matthew Paris, the politician of fifty years later, a writer who, he admits, was intensely prejudiced against both king and pope. Of him he says that he was much less scrupulous in interpreting the course of events by his own impressions than any English historian who had preceded him.

When Bishop Stubbs' most valuable introductions to the Rolls Series were collected in a volume and published (edited by Arthur Hassall, 1902), the preface to the first volume of Walter of Coventry, containing the valuable accounts of the MSS. and their

handling, was altogether omitted; but the monastic abuse of John, the collection of all the ill words of Matthew of Westminster and the others, was printed at length. It is characteristic of our modern teaching of history.

CHAPTER XVII

THE INFLUENCE OF THE MONASTIC HISTORIANS (*continued*)

Matthew Paris and Mr J. R. Green.— Comparatively few people read Bishop Stubbs' masterly prefaces in the Rolls Series. I take a further illustration from a very popular book, Mr J. R. Green's *History of the English People.*

In the *Chronica Majora*, the enlarged edition of Roger of Wendover by Matthew Paris, you will find this passage (R.S., No. 57, vol. ii. p. 669):

Quidam autem versificator, sed reprobus[1] de eodem ait;
Anglia sicut adhuc sordet fœtore Johannis,
Sordida fœdatur fœdante Johanne gehanna:

which may be Englished:

As hitherto England is befouled with the stinking John,
Foul hell is stinking with the stinking John.

[1] I have taken *reprobus* as referring to personal character, as the versification seems quite up to the monastic mark. *Reprobus* would be equivalent to lost or damned.

I would point out that we come here again to the connection of oral tradition with the MS. of history. Some travelling rhymer probably, *sed reprobus*, comes to the monastery, and, knowing that the monks of St Albans had no love for the king, whose mercenaries had plundered their cellar and kitchen, quotes them this couplet. The historian writes it down some day as a good joke to be passed round the table of the monastery.

Almost any stone will do to throw at John. This is how Mr Green in his *History* uses this very filthy couplet. "Foul as it is," he says (*History of the English People*, vol. i. p. 229), "hell itself is defiled by the fouler presence of John"; and the historian gravely and seriously goes on to say of this anonymous jest reduced to writing many years after John's death: "The terrible verdict of his contemporaries has passed into the sober judgment of history."

The sentence is used in Mr Green's *History* before he passes to the consideration of the most important events of John's reign, blinding the eyes of any reader to the causes which were working in a transition time, the most important transitional time of our early history, to modify and change institutions and ideas. The grander the conceptions of the historian, the more seductive his style, the more hopeless it is that the reader of history should ever see the causes underlying historical events, which are the only matters worth treating in

history, in view of the perpetual abuse of the men in authority.

School Histories.—The school histories follow the larger ones in this respect. An excellent school history of England has a chapter on John's reign in which occur the following passages: p. 129, "John lay in sensual enjoyment at Rouen"; p. 131, "though acting thus violently, John showed the weakness of his character"; p. 132, "in a state of nervous excitement, . . . a policy which in any other king would have accepted as national and good"!; p. 133, "the king's rapacity, his tyrannical conduct"; p. 134, "the weakness which was hidden under the violent and ostentatious passion of John, . . . his boastful obstinacy"; p. 136, "with his usual folly"; p. 140, "he died perhaps a victim to his own greediness." This last piece of spiteful slander (according to Matthew Paris and Mr Green his sickness was inflamed by a gluttonous debauch) is a very good instance of the desire of these historians to put John in the worst possible light. He died, as most mediæval kings died, either of indigestion or poison. The Annals of Loch Cé record his death: "John, king of the Saxons, was deposed by the Saxons in this year, and he died of a fit." The editor quotes the Annals of Clonmacnois, where he is said to have died from "drinking of a cup of ale wherein there was a toad pricked with a broach," and the Annals of Bermondsey, "ut quidam ferunt, venenatus cum cerusis per

quendam monachum nigrum Wigorniæ." The suggestion of greediness or debauch is only an example of the intense animus which actuates the modern historian when he touches on this subject.

Mr M'Kechnie's "Magna Charta." — The habit continues now. Mr M'Kechnie's most valuable book on Magna Charta is deprived of a great part of its value for historical purposes by his assumption that in every case the charter was designed to curb some innate iniquity in John. This is not the place in which to review the charter, but I would point out that hardly a chapter in this book is treated by Mr M'Kechnie without abusive language, and without attributing evil acts and bad motives to the king, of which he produces no proofs.

For instance, in chapter xxiii., dealing with the repair of bridges, he assumes that the provisions restricting their repair were made because John ordered them that he might "go afowling with his hawk upon his wrist," an explanation quite out of the question for a king whose time was taken up flying through his dominions from Ireland to Aquitaine. No evidence whatever is offered in support except some expressions in an order of Henry III. in later years. John "issued letters compelling the whole countryside to bestir themselves in the repair of bridges. Several such writs of Henry III. are extant." Mr M'Kechnie goes on to declare that John did this "with the object not so much of indulging a genuine love of sport as

of inflicting heavy amercements on those who neglected prompt obedience to his commands," an unsupported slander, quite in the style of Matthew Paris or Ralph Niger.

The dispute about the repair of roads and bridges between different authorities goes on always. As commerce increased, as there was more movement, as new bridges were built over rivers, the question as to who was to be responsible for them arose. The barons and persons with private franchises wished to put the responsibility on the king, and he on them. For instance, in Y.B. 14 Edw. III., p. 293, there is a case where the sheriff distrained the bishop of Coventry on the ground that as lord of Hanworth he had not repaired the bridge of Hanworth. The bishop claims that the bridge was in a liberty outside the sheriff's jurisdiction, and that there was no highway or common passage. The inquest find the facts for the bishop, and the sheriff is in mercy. The reporter adds, "and note that the bishop did not recover damages. Quære." No one ever does recover anything in a dispute with the king, apart from force.

The Ill Effects of these Methods.—The dispute between John and his barons was no question of right or wrong, of evil or good. A new condition of things had arisen which either had to be settled by agreement and compromise, or, if neither party would give way, by force. The causes which led to the change, the economical agencies which were

at work, the new ideas which had permeated thought, the responsibility of the society itself for the results of its actions, are hidden from the student of history by the incessant abuse of the man in power. He is not led to inquire why John lost Normandy, why like his great antagonist Philip Augustus he had in the end to bow to the authority of the pope, or why he was unsuccessful in stemming the reactionary wave of baronial authority which had been checked by his father.

I am not proposing to make the slightest effort to defend or reinstate his character. The centuries of monastic slander, almost entirely unsupported by any concrete fact or evidence, have left on him, as Fuller says, dirt which cannot hereafter be washed off. John, whether he were an uncanonised saint or an impossible blackguard, is dead and recks nothing of what is said of him.

My protest is on behalf of the historical student against the avoidance of economic cause which is the result of this blind acceptance without any inquiry of any silly story[1] with which the thirteenth- or fourteenth-century monk chose to entertain his readers. The age was, as Pollock and Maitland say, "the moment when old custom was brought in contact with new science," "it was a perilous moment." John fell under it.

Some great historians see the extreme

[1] Such as that John, at Bristol in 1209, ordered that no birds should be taken throughout England.

danger to a sense of historical proportion which follows from a neglect to watch and weigh carefully every statement of these monastic chroniclers.

Skene (*Celtic Scotland*, i. 119) rebukes the "carefully manipulated fictions of Fordun and the still more fabulous narrative of Hector Boece and his followers, and speaks (vol. iii. p. 336) of the period from the succession of David I. to the death of Alexander III. as "the period of the manipulation of the chronicles and the gradual formation of that spurious system of national history which, originating in the ecclesiastical pretensions of St Andrews, was developed during the great controversy regarding the independence of Scotland."

Mr Maitland (*Domesday Book and Beyond*, p. 277), discussing the authorities for the manorial court, warns us in the same direction. "So careful must we be in drawing inferences from singular instances, so wary of forgeries, that in the end we cannot dispense with arguments which rest rather upon probabilities than upon recorded facts."

Why bring up young people on a gospel of hate? The abuse of the king or the church, the two great agencies for human advance in the Middle Ages, on the authority of unknown men making or repeating statements without proof and without first-hand knowledge, draws away the mind from the study of the causes underlying historical events and deadens in the student any good instincts or high ideals.

CHAPTER XVIII

OTHER REDUCTION INTO WRITING

THE writing and manipulation of the Chronicles were going on in the twelfth century in other parts of the islands as well as in England and south-eastern Scotland.

The French epics of Charlemagne and his heroic warriors were taking shape; Geoffrey of Monmouth was writing his *Historia Britonum*; Caradoc of Llancarvan was editing in the *Brut y Twysogion* a historical continuation of the romances of Arthur and his knights by Geoffrey of Monmouth; Master Wace, of Jersey, canon of Bayeux, was re-editing at Caen for Henry II. an enlarged edition in Norman French of Geoffrey of Monmouth under the title of *Le Romans de Brut*; the series of Irish Annals were being continued or reduced to writing in various parts of Ireland; and the Scandinavian Sagas, the creation of lay men of action, the only mediæval records in which there is a love element—records from which we may learn much of the social and political history of the Orkneys, Shetlands, and western Scotland and many particulars of the other parts of the islands,—were being reduced into writing.

The Welsh Records.—Of the Welsh Annals there is little to be said. They were written in the monastic Latin; they treat of the rela-

tions between England and Wales, and are useful to us as a check upon the accuracy or the animus of the English Chronicles, as they are frequently neither in agreement with the English accounts of the political relations between the countries nor with the accounts of English victories. But, apart from such use, they touch very little on matters of general interest and give us few touches of social life. They stand midway between the English Chronicles and the records of the other parts, and they are sufficiently under Roman influence to partake of the English outlook on affairs. They are valuable only in linking up England with the rest of the islands.

But scanty as her monastic records are, Wales has this much in common with the western parts of the islands, that she was sufficiently free from the deadening influence of the Roman monastery to produce an imaginative literature from which we catch many glimpses of social conditions. There are a succession of Welsh bards who, up to the close of the thirteenth century, sing in their native tongue of war ("c'est le cri de guerre des Bretons contre les Saxons envahisseurs"), and, after the Edwardian occupation, of love and religion; and there are for social history documents, though they can hardly be called historical authorities, the romances of the Welsh heroes, the Mabinogion, and the stories of Arthur, which give us much information on tribal life and habits. For instance, the

advantages of fosterage are commented on in the story of Pwyll, prince of Dyved.

When, however, we leave England for Ireland and north-west Scotland, we come into an entirely fresh atmosphere. There is nothing in common between the two sets of records. They are utterly opposed in more than one respect.

The Absence of Ill Words.—There is between the Roman and English writers and their Scottish imitators, and the chronicles of the rest of the islands, this most striking difference. As soon as one leaves the English monastery, the vituperation of the king and of his men in authority, the drawing and pointing to evil qualities and evil actions, the assumption that all good and all sanctity are confined within the walls of the monastery entirely disappears;[1] it is wholly absent from the Irish Annals as from the Sagas of the Orkneys or of Iceland; they have, where the matter has any human interest, which is occasionally the case in all chronicles, all the natural ease of a child's story in the place of the self-conscious imitation of the Roman classic.

One wonders why it is that, so soon as one leaves the records of the Roman monastery, this great change comes about. It is certainly not from any want of civilised ideals. At the

[1] *E.g.* Saxon Chron., anno 1087. "The king and chief men loved much (and too much) covetousness of gold and silver, etc., etc. . . . little right dealing was in this land among any people except among the monks alone."

time of the writing down of the Sagas the Scandinavian powers were in the front rank of commercial nations; the men who wrote the Irish Annals, the men who illustrated the Book of Kells, who at a time when romance was absent from England were possessed of a great imaginative literature, who were eminent in art and science, whose proficiency in music the jealous Giraldus is compelled to acknowledge, were not likely to have neglected this form of literary composition if it had appealed to them.

Their care for scientific accuracy could be shown from many instances. As an example, the items for 1199 in the Annals of Loch Cé begin as follows: "1199. The Kalends of January on the 6th feria, the 1st of the moon. Ab Incarnatione secundum Dionysium m̄cxcix.; ab Incarnatione secundum Bedam m̄cxcii.; ab Incarnatione secundum Ebraos ūccccclii.; ab initio secundum lxx. Interpretes ūidcli.; cycli solaris xxiiii. annus; cycli Indictionis ii. annus; cycli lunaris xix. annus; tertius annus præparationis bissexti; cxxxiii. annus undecimi cycli magni paschalis ab initio mundi."

These calculations were not mere copyists' work or from astronomical calculations, but from actual observation. There is an account of an eclipse of the sun in the year 664 in the Annals of Ulster and in Tighernach in which the correct day and time are given, while Bede, calculating from the mistaken Dionysian indiction, gives the wrong date. Does this fond-

ness for scientific accuracy come from the East? It is very seldom that you will find any astronomical calculations in the English contemporary records under Roman influence. Clearly the men who wrote these bare Annals and omitted to abuse the king did not do so from want of literary or scientific ability.

But there it is; as soon as one leaves England, one leaves behind all the senseless vituperation, all the conceit of superior morals of William of Malmesbury and Matthew Paris. It cannot be wholly the influence of the Crusades, for Norway and the Orkneys and Wales contributed to them.

That no doubt was a factor. The break in the great Irish civilisation comes, as it would seem, when Ireland stood aloof when the rest of Western Europe learnt the lesson of humility from contact with the civilised Moslem and of unity under the papacy, and connected themselves once more with the learning and science of the Roman Empire of the past. Ireland stood still; she ceased to develop both ideas and ideals.

But the Crusades were not the only factor even here to create this distinction of manners.

It is not accounted for by the attachment of the bards or skalds to the courts of kings, for the Irish and Scandinavian bards wrote as mercenaries for pay, like the English monks, who were often attached to the king's court; it cannot be wholly attributed to their social position in the tribe, for they are quite as self-

restrained when dealing with the Saxon king and his barons as with their own people. Imitation of classic and post-classic Latin writers, the models for the monastic Latin writers, brought about by the closer connection with Rome following the Crusades, would appear to be the ultimate cause.

The difference is very striking to anyone who will take the trouble to read the Irish and Scandinavian by the side of the English records.

The Difference of Language.—Another distinction between those parts of the islands uninfluenced by Rome and the English Chronicles is the difference of language.

In those parts where there was no native literature, as in England, where the dialect common to both Angles and Saxons had ceased, except as the speech of the common people, to be a living language, the monastic Latin dominated all literary and historical writing. But in those parts of the islands which were not under the direct influence of Rome the native tongues—Irish, Welsh, Scandinavian—were putting forth a literature which blossomed until they too fell under the frost of the monastic Latin, which lasted as the only proper vehicle for serious literature in England well into the nineteenth century.

Mr Alfred Nutt (*Notes to the Mabinogion*, 1910, p. 359) puts the position more boldly from the literary-artistic point of view. Pointing out that the vernacular prose, original in

its character and possessing within the limits of its range the highest excellences of form, is found only in Ireland, Wales, and Scandinavia, he says: "It is the surprising merit of these small outlying peoples—Irish, Welsh, Icelandic Norsemen—their essential service to humanity to have preserved the barbaric element comparatively free from the contamination of Christian classic culture. Had Rome crushed out that element in the west and north as she crushed it out in the south and centre of Europe, modern imagination, modern artistry would have been inconceivably the poorer." Unfortunately, English people, brought up in monastic schools on classic Latin, are wholly ignorant of such vernacular literature.

Even in Normandy we meet very early not only with Annals and Romances in Norman French, but with whole volumes of customary law in that language side by side with monastic Latin. Only in England is a vernacular literature non-existent in the twelfth and thirteenth centuries.

It would not seem that any difference of language ought to have made any difference in the handling of facts or drawing of character. But it remains the remarkable fact that the steady stream of evil speaking, which forms the foundation of our modern history, is found only in the Latin Chronicles which the Benedictine monk controls.

The Irish Annals.—The Irish Annals, which

are the Chronicles also of Western and Northern Scotland, fully bear out this statement. There is in them no imitation whatever of the Roman model. They are almost entirely registers of events or facts, including scientific, astronomical observations.

They are without any attempt at exotic eloquence, but their very simplicity gives an appearance of reality, often of lively realism, to what they relate, a natural style offset by the, to us, repulsive forms of the names both of men and places. These records ignore for the most part all that was of interest to the Roman monk of England; no letters of popes or of emperors adorn their pages; there are few notices of events ecclesiastical. We seem to have come back to the bald simplicity of the Saxon Chronicle.

There is not only an entire absence of character drawing, but when these Annals comment on current events it is only in the very rarest instance that they make any mention of vengeance for evil or use any abusive epithet of the men who brought misery upon their country. The place of abusive epithets is taken by expressions of admiration for courage and prompt action.

Another difference is that for the most part they are transcripts, made often in the sixteenth and seventeenth centuries, from earlier compilations which have disappeared. This re-writing or re-editing is no new thing. The English Chronicles were always tran-

scripts of earlier MSS. But with them there was a regular succession of writers continuously preceding who could be traced and copied, including well-known public men such as William of Newburgh or Roger of Hoveden. There is no such succession in the Irish Annals, no such knowledge of an earlier authority, and hence no such chance to check or verify the facts.

The history of the Annals of Loch Cé, for instance, which I have used for choice in preference to other Annals, can be little traced (like Walter of Coventry) further back than its ownership by Brian MacDermot of Carrick MacDermot, in Co. Roscommon, who died in 1592. It appears to have been transcribed in the last quarter of that century from more ancient documents. Very little is known about the MS. It used to be called the Continuation of Tighernach. But the Annals of Loch Cé begin with Clontarf in 1014, while Tighernach died in 1088.

Dr O'Donovan, a great Irish authority, decides that this is an ancient copy of the book of the O'Duigenans of Kilronan, called the Annals of Kilronan, of which the Four Masters made use in 1632–6. But this was not their copy, as it begins and ends at a later date. In their preface they tell us what documents they used—documents extant in their day, many of which are now lost.

It is for this reason, I suppose, that the

Irish Annals are frequently late transcripts (or is it because of the wide hereditary contempt in which the "Anglo-Saxon" holds the Irishman?), that they have not been considered, as historical authorities, as of so great value as the Benedictine Chronicles of England. Each Annal treats, like all mediæval records, of the events and persons of its own locality, and of its own local interests. The Annals of Loch Cé are the family records of the MacDermots. It has to be supplemented by others. Yet they appear to me to be of as great if not of greater value than the English records, as in them there is no appearance of the commentator serving a political party or a political purpose in his statements. It is because they are so useless, by their un-Roman detachment, for constitutional history that they are so valuable for real history.

The impersonal character of the narrative is accounted for partly by the unity of king, church, and people through ties of kinship, in the communal society. But this is not all. The "Saxon" king and the "foreigners," who had settled in the country, are spoken of from the same cold remoteness.

The process by which the Irish Annals were formed is suggested by Mr Hennessey in his preface to the Annals of Loch Cé, an account of origin which may well be transferred almost word for word to the English Chronicles. Speaking of the general correspondence in the

arrangement and contents of the more ancient chronicles, he says: "The Irish Annalists who succeeded Tighernach down to the time of the Four Masters with few exceptions seem to have borrowed their materials principally from his chronicle as far as it went. This formed the skeleton of each body of annals, to which was subsequently added such information as could be gleaned from the registers of local monasteries, from tradition, and sometimes from those historical poems which formed the substitute for annals among the Irish in ancient times."

These substitutes, drawn from the records of the memory, form the foundation for all annals, English as well as Irish. There is an immense amount of material both for law and history in poetic form waiting, in MS. in the library of Trinity College, Dublin, and elsewhere, to be deciphered and translated by an imperial government.

The Four Masters.—The Collection of the Four Masters, which, owing to its earlier translation and publication, has become the most prominent authority for Irish history of all the Annals, was a digest of them all. It was written in the convent of Donegal in the years 1632–6 by Michael O'Clery and three others. He describes himself as a Franciscan, "for ten years employed under obedience to my several provincials in collecting materials for an Irish hagiology." Lamenting the general ignorance, he explains that he has

"collected the most authentic annals I could find in my travels through the kingdom."

The books which he said he had collected and compared were the Annals of Clonmacnois, now known only through the seventeenth-century translation, the Annals of the Island of Saints on the banks of the Rive (not now known), the Annals of St Magnus on the lake of Erne, now called the Annals of Ulster, the Annals of the Maolconarys (not now known), the Annals of Kilronan compiled by the O'Duigenans, which is now known by the name of the Annals of Loch Cé, and the Annals of Lecan compiled by the MacFirbis, from which the Chronicon Scotorum may have been abstracted. This collection was made just on the eve of the civil war, in which it is supposed that nearly all the original materials perished, the original MS. of the compilation by the Four Masters being lost for a long time.

In connection with this compilation there is one more notice of the Brehon to which I will refer. The preface to the Four Masters tells us that Cucogny O'Clery, one of them, held a certain half-quarter of land in Donegal until May 1632 on a payment to the assignee of the Earl of Annandale. But then, "being a meere Irishman and not of English or British descent or surname," he was dispossessed and the land became forfeited to the king.

When in 1664 he died, he made a will written in Irish in which he bequeathed "the

property most dear to me that ever I possessed in the world, namely my books, to my dear sons Dermot and John. Let them copy from them without injuring them whatever may be necessary for their purpose, and let them be equally seen and used by the children of my brother Carboy as by themselves."

Among the MSS. in the library of the Royal Irish Academy in Dublin is the Leabhar Cabhala, or Book of Conquests, compiled by Michael O'Clery. It consists of a series of authentic poems and other original documents from the earliest times to the period of the English invasion, and is in fact a collection of the authorities and sources of the early history of Ireland (preface to the Four Masters).

The value and authority of the Four Masters, says Mr Hennessey, "has been seriously diminished by the disingenuous practice frequently followed by the compilers of omitting or suppressing entries which may have seemed to them to exhibit the character of ecclesiastics in a questionable light or to cast discredit on the church of which they were zealous members," a very unfair accusation, considering the disabilities under which the Roman Catholics in those days laboured. The compilers of the Annals of Loch Cé, he says, seem to have made their entries irrespective of such considerations.

Reading them by the side of the English Chronicles, they are not only more human,

more racy, less absurdly sententious, less concerned to depress the monarchy and lay authority, but they are apparently less influenced to exalt the ecclesiastic at the expense of other men.

As the Columban monasteries only gave way to the Benedictines at the English invasion, any ecclesiastical writing was probably done by the Franciscans who overran Ireland at that time—so far as any editing was done by any other than the family Brehon.

That the editor was not always the conventional occupant of the monastery may be seen in many examples. For instance, under 1233 the Annals of Loch Cé record: "This was the termination of the sovereignty of Roderick O'Conor, king of Erinn; for the pope had offered right over Erinn to himself and to his seed after him for ever and six married wives, provided that he desisted from the sin of the women from thenceforth; but Roderick did not accept this."

It is a very curious entry for several reasons. The Irish Brehon might well represent the pope as conferring Ireland for ever on the Irishman, both from the desire for it to happen, and for the effect which prophecy may always have on actual facts. The entry might really remotely refer to some project in the past during the interdict to absolve the Irish from any allegiance to John (see *C.D.I.*, No. 448, the declaration of Pembroke and others in 1212, and Nos. 435, 444), though if it had any

foundation in reality there ought to have been long letters in Latin between the pope and Roderick quoting bits of Ovid and Moses and Isaiah.

But no monk under the Roman obedience would dare to suggest in an Annal that the pope should allow even an Irish king six wives as part of a bargain. The entry is interesting for this reason, that one of the great advances in morals, which we owe to the Church, is due to her stand against the polygamy which was the ruin alike of the Scandinavian and Irish kings. Even Wales was so far under Roman influence that, although divorce was very easy, "no man is to have two wives" (*A.L.W.*, Ven. II. i. 54).

The Irish and Scandinavian kingdoms stood outside the Roman sphere of morals. Hoveden (1194) notes that it is the custom that everyone who is known to be the son of any king of Norway, although illegitimate and the issue of a bondwoman, has equal right to lay claim to the kingdom of Norway with the son of a king legally married and being the son of a free woman; and he points to the lamentable results in perpetual wars of extinction. The writer of the passage in the Irish Annals must have been a Connaught Brehon, who, being unmindful or regardless of the salutary if very imperfect regulation of the sexes by the Roman system on payment, puts into the mouth of the pope the practice or custom of the Irish king. The *adaltrach*

woman of contract figures throughout the Brehon laws, which contemplate more than one wife and allow a chief to take four secondary wives with the consent of his chief wife and his sept (*A.L. Irel.*, ii. pp. 23, 397, etc., and v. 73).

CHAPTER XIX

THE SCANDINAVIAN SAGAS

THERE is neither space nor time here in which to treat adequately of the value and interest of the Norwegian and Icelandic Sagas as an important source of matter for social history of all parts of these islands.

Whether they are viewed as bearing on racial theories, as providing historical facts, as evidence of political and social conditions, as indicating the course of the origins of our law and legal procedure, or as literary works, they are worth far more close and sympathetic study than they receive.

The Anglo-Saxon. — The reason for this neglect is, I believe, to be traced to the theory generally held that the inhabitants of England, the only part of the islands of which the history is considered to be worth recording, are descended from a mythical race called the Anglo-Saxons.

There may have been such a race, as there

may have been peoples in times past called Sanscrits or Vedas. The sexual intercourse which resulted from the perpetual wars between the Britons, Picts, Scots, Jutes, Angles, and Saxons, and the further dilution of blood with three or four Scandinavian peoples, with the Frisians and Germans, with the Gauls of Brittany, with the French, the peoples of Poitou, of Aquitaine, Spain, and Ireland, may very well have resulted in a mixture of races to which such a convenient name might be given. But apart from the use of a common dialect among many of these people, to which we owe the Saxon Chronicle and to some extent our glorious translations of the Bible, there is nothing to show that the nation of the Angles of the north-east, who gave their names to England, whose ecclesiastical history was written by Bede, and the Saxons of the south-west, had any racial affinity whatever, or that they were ever a race in any sense of the word.

The use of the phrase has resulted, under a line of Hanoverian kings of England and Scotland, in a fiction which imagines the West European world for the purposes of English history to be divided into two opposed distinct races, the Teutonic and the Celtic, the Teutonic providing all the substantial and useful things of this world, and the Celtic the evil and imaginative influences. The two races are supposed to be a part of the great Aryan race, whatever that may mean; but

none of the distinguished authors who use the phrases ever explain what is meant by them, except to attribute to one or the other the good or evil instincts of mankind, such as trial by jury or fosterage; they leave in doubt which race includes the Norsemen or the Normans or the men of Flanders or Aquitaine; the words are simply used as a peg on which to hang a theory of the innate superiority of the German.

Such a fictitious division of peoples would not matter if it were merely a dead antiquarian classification used to save trouble; so far as they tell for peace and unity all such fictions are beneficial. But it is a living obstacle to historical investigation.

Leaving to one side Sir Henry Maine's works, which were written just as the publication of the Brehon laws was first calling attention to the usages of the Irish people, I take illustrations from authors of the very highest reputation, from that most valuable book, Messrs Pollock and Maitland's *History of English Law*. The authors were most noted writers both on law and history; Mr F. W. Maitland was one of our greatest builders of history, a writer of such supreme insight and accuracy and clearness of thought and perception as to discourage anyone from challenging his smallest statement or opinion. Where such men adopt what I urge is a false and mischievous view of a word, the lesser men follow them like fence-breaking sheep.

In vol. ii. p. 84, speaking of the conveyance of land in ancient times, the taking of seisin not by writing but by an emblematic act of possession (as when the Irishman in distress proceedings enters on the land with a specified number of men and horses and remains a specified time, *A.L. Irel.*, iv. 3, 19), they say, "It seems probable that in this respect our law represents or reproduces very ancient German law," "of the ancient German conveyance we may draw some such picture as this."

On p. 219 they point out that the king's courts had refused to attribute any legal efficiency to "what we may call the old Germanic forms, the symbolic wed and the grasp of hands," the handshake which, as I have pointed out above (p. 76), was until a very late date the usual form of closing a contract in the Norwegian Orkneys.

On p. 213: "We may take it as a general principle of ancient German law that the courts will not undertake to uphold gratuitous gifts or to enforce gratuitous promises," like the *exceptio non numeratæ pecuniæ* of the Roman law. As a man may promise anything and change his mind before he has handed over the thing, this would seem a commonsense rule of mankind. But as the Irish Brehons are so insistent on the extreme sanctity of verbal contracts, it may be that in this instance, as in so many others, they were far in advance of the German in early times (see *A.L.*

Irel., i. 41, 51; iii. 3; *A.L.W.*, Ven. II. viii. 10, 11).

On p. 425 the authors attribute to the German "that ancient morning gift which appears in every country in which the German sets foot." Unless the German set foot early in Ireland and Wales, this is going a little too far. It is a custom common to all ancient society, the Welsh "cowyll" and probably the Irish "coibche." To quote only from those imaginative romances which have no suggestion of German manufacture about them, in the Mabinogion (*The Dream of Maxen Wledig*, p. 89, edit. 1910) the damsel "the next day in the morning asked her maiden portion" and received the island of Britain.

On p. 592: "We see much that is very old and has been common to the whole Germanic race, as for example the principle that a man is entitled to three successive summonses," a procedure which you will find in the ancient Irish law of distress (*A.L. Irel.*, iv. p. 3 *et seq.*), with many other examples of the same kind.[1]

This peculiar theory has a twofold effect, general and special. Those who are under its influence are in the position of Sir John Davies as he viewed the Irish law Away from Rome and Roman law, all that is worth

[1] Mr Nutt, in his notes on the Mabinogion, divides this extraordinary race (p. 358) into the Irish and the northern Germans, the English Germans, and the continental Germans.

considering in history, all the social usages of life or political or legal institutions are attributed by them to England from a German origin. Possessed by this idea, our minds are turned away from considering the development of the European peoples as a whole, or of any other nations in comparison with our own, condemned to walk in a narrow rut both legal and historical, dependent on German writers, often very second-rate ones, for what we think.

But it is not this general effect on study which has led to this emphatic protest here. It is rather the special effect that the theory has expelled almost entirely the great Scandinavian element from English and therefore from British history, and has replaced it by an imaginary German.

The Extent of the Scandinavian Settlement.— From the time of Ethelbald in the ninth century the Scandinavians remained in possession of all England north of the Watling Street line from Chester through Bedford to the Lea. In Alfred's day they permanently colonised and cultivated it, accepting the overlordship of the Saxon king as a controller of their quarrelsome tribal units; there has since been no immigration to modify it, except from time to time the industrial immigration from Belgium into East Anglia; the district between the Humber and the Ribble was for many centuries a beaten highway for the Scandinavians from their bases of invasion in

the east and their settlements in north-east England to Man and Ireland.

The Norwegians held or controlled all Scotland north and west of the Grampians, with the Isle of Man, up to the first third of the thirteenth century. The Orkneys and Shetlands remained in their hands until 1470. Even in central Scotland Norse names show the permanence of Scandinavian settlement. Sir J. H. Ramsay, in the *Bamff Charters*, points out the number of Scandinavian names in Perth and Forfar, where they might be least expected.

Even in England south of the Thames and Severn, the only part of the islands except south-eastern Scotland which could be called Saxon or Teutonic, the proportion of Scandinavian blood must have been very considerable, from what we read of Alfred's Frisians and Edgar's bishops ("he outlandish men hither enticed and harmful people allured to this land," Saxon Chron.) and Ethelred and Edward the Confessor's thanes.

There is no more reason to suppose that the Norse blood disappeared from the isles when the power of the Norse kings relaxed its hold than to suppose that the mass of American colonists ceased to be of British blood after the American revolution. There is probably to-day more blood of Scandinavian origin in this country than of any other of the mixed races of the islands, unless it is French.

These facts would not affect the subject

except that we owe to the Scandinavian element in our history, to the explorers of the early ages, the men who discovered Iceland and Greenland and Wineland, and who fought and conquered all over the islands, our free institutions, the groundwork of law and free government, the impatience of tyranny, the hardness, the fearless spirit of the sea—those things which our constitutional historians put down to the Germans, whose "pot-bellied equanimity" requires the same drilling to-day that it got in the eleventh century. Nelson was no Anglo-Saxon.

If our students of history were allowed to take a little more interest in the Norse Sagas, much light could be thrown on political, legal, and social questions which are often confused.

When in 1412 Norway fell under the dominion of Denmark, her great literature ceased to expand; the Norse Sagas of the kings, which had been of great value for British history, no longer assist us. But the Icelandic Sagas of social life, told by the descendants of men who had gone to Iceland from the British Isles, the Hakon and Magnus Sagas of the Orkneys, the accounts given by Are and Soemund Frode and their successors of the political and social institutions of Iceland applicable to and necessary for British history, we can get nowhere else.

The Conflict with Feudalism.—When feudalism came to southern England in the tenth and succeeding centuries, it took root easily through

its close connection with the Church and with Rome. It interwove itself with and superseded the Germanic customs of the Saxon. But north of Watling Street it was an alien system, forced through the ages on adverse forms of living which offer successful resistance in proportion to the likeness of their military or commercial surroundings, or the physical or climatic features of the country.

When James I. and VI. sets out to destroy the northern statesmen of the dales, they successfully oppose him, but he succeeds greatly before the men of the Western Isles. The bastard son of James V. for the time ruins the Orkneys, while Ireland still carries on through the centuries the struggle with her feudal masters.

We can only understand the history of any one of these parts of the islands by entering with our souls into the inner spirit of the social system which we find in opposition to feudalism, whether in its beauty or in its decay, and we can only do this by making use of the material open to us in the ancient Laws of Ireland and Wales, the Irish and Welsh Annals, and the Norse Sagas and Laws.

To these Norse ancestors we owe whatever is best in our ideals of freedom. Whenever real resistance to oppression or reform of political government in England was effective, it generally came from the north.

Students would learn more about free institutions by reading the Nial's Saga than

by grinding through all the abusive attacks on John which are meant to illustrate Magna Charta.

The Icelandic Sagas.—Iceland may seem far off now and negligible, but in those days it represented a society of men of means and learning who had fled from the feudal innovations of the king of Norway to found a state of free landowners. The account of the Icelandic society given in these Sagas is applicable in some degree to every part of the British Isles except the southern part of England and the part of Wales which the Normans controlled.

There one may read of the frequent Things, not parliaments of dilatory talkers but meetings of alert administrators, at which customs were declared and suits followed, of the elaborate and very technical procedure of the Hill of Law, told in the different Sagas, of which the Manx Tinwald was a survival, of the extreme care with which the forms were observed (see Nial's Saga, pp. 101–3, 129–31), and of the frequent efforts at arbitration by which, in days of general violence, men of good judgment and calm temper settled dangerous disputes. Their customs should be compared with the laws set out in the T.A.C.N. to which our early English law is indebted.

But apart from the sources of political life, apart from the origins of law, one gets in the Sagas, what no other record of early times

gives one, an account of the conditions of social life among the men who labour, not necessarily ignorant or unthinking men, men greedy of news of the world, interested in all the refinements of litigiousness (even the boys play at law, Nial's Saga, p. 17), and eager to put on record local and family affairs; men living hard, frugal lives little removed from want, with few luxuries and few pleasures, in a little world all their own, a type of the men of all parts of these islands from which some of the Icelanders came, except where in the monasteries or the courts and halls of kings and nobles men lived as they are described in the monastic chronicle.

This is the kind of man these Sagas love to tell of: "He was a tall man in growth and strong withal; a good swordsman; he could swim like a seal; the swiftest-footed of men, and bold and dauntless; he had a great flow of words and quick utterance; a good skald too; but still for the most part he kept himself well in hand" (Nial's Saga, p. 44).

It is perhaps because they remained pagan to a much later date, frankly pagan, as much moved by the elemental passions as the Greeks of Homer's time, that they give us such a natural, unaffected picture of everyday humanity.

Even when they became Christian in theory, their Christianity was of an unconventional character. Although it was made law that they should be Christians, it was allowed for

a time at least to the conscientious objector that "as to the exposure of children the old law should hold, and also as to the eating of horse flesh. Also men might sacrifice secretly if they wished."

Courage, and courage alone, was their first Christian virtue. When an Icelandic bishop lay dying, and "there was great pain from his disease," "and men thought they could hear his bones rattle when he was moved," a sympathetic woman asked him, "How low should a man's strength become when there should be vows made for him?" But the bishop answered, "For this only should ye make vows to God, that my pain should go on ever increasing, if a vow be made at all, as long as I am able to bear it; for it is not permitted that a man should have himself prayed out of God's battle" (Hungrvaca, iii. 3, 12, in *Orig. Isl.*, vol. i.).

Battle and homicide, the undying feud of revenge, runs through every page as in Homer, taking no doubt, as such deeds do in all records, a much larger place than it held in reality; the true story-teller sings with greater spirit of the exciting forms of the physical conflict than of the dull forms of legal pleadings. Like the legal quarrels of Homer's heroes, the suits at the Thing may at any moment change into the reality of battle.

It is not by any means the least of the merits of the Sagas that, apart from the perpetual splitting of skulls, they are clean

reading. There is no suggestion of immoral leaning in them, no dwelling on or gloating over evil, no tales of horror or of inhuman torment, such as you may read in Dante or in the monastic records. They are good stories introducing often historical people, well and briefly told, set in artistic form, without any moral or hind thought, in many respects like the Greek epics, except that the women are in a different position, resembling Clytemnestra far more often than Briseis. They are not only valuable as history but suggestive of thought.

The Position of Women.—It is a contrast well worth noting, since it is a test of social conditions, though I do not propose to touch it in any detail, the position of women in the Scandinavian world compared to that which they occupied under monastic influence and ideals borrowed from the East in countries governed by feudalism.

The Norse women and the Irish women held a place of very near equality with the men. The Sagas show us women making their own bargains on betrothal (Nial's Saga, chap. xiii.), and disposing of their own goods and money (*ibid.*, chap. xviii.). A strange man asks Bergthora, "Hast thou any voice in things here?" "I am Nial's wife," she says, "and I have as much to say to our housefolk as he." When Nial is burnt in his house and the murderers offer to let Bergthora escape, she elects to die with her husband.

They could claim divorce for small causes. "Thordis stepped forth and named witnesses to herself and proclaimed a divorce with her husband Borc, and laid this as the cause that he had struck her" (Erbyggia Saga, iv. 2, 14).

The Icelandic women held land and brought land with them as a marriage portion, and managed it themselves (Landnamaboc, II. iii. 5, 6). But it was decided in a case where there were only women heirs that they should not be avengers in law in future in a suit for manslaughter, as they did not sufficiently follow it up (Erbyggia Saga, iv. 2, 38). In the Orkneys the daughters took half a son's share in the land.

The Irish law contemplates three cases: (1) where the property on both sides is equal; (2) where the wife is supported on the man's; and (3) the man on the wife's property. With exceptions of benefit to both, neither could in the first case make a contract without the consent of the other; where the man had the property, he could contract without the wife, excepting the sale of clothes and food, cows and sheep. Where the woman had the property, "the man goes in the place of the woman" (*A.L. Irel.*, ii. 359, 363).

With these contrast the following under feudal law from Jocelyn's Life of Abbot Samson. The abbot has the wardship of the three months old daughter of one of his feudal tenants annexed to three manors. "He could have sold her," says Jocelyn, for 300 marks;

but as her grandfather had carried her off, he could not "obtain seisin of the damsel" except by the assistance of the Archbishop of Canterbury. So he sells her to the Archbishop for £100, and the Archbishop resells her with her three manors for 500 marks (about £333). King Richard had applied for her for one of his followers, but, as she had already been sold, he has to be appeased by a present of hunting dogs (Jocelyn, 147, 187).

When, in the seventeenth century, the Jacobean lawyers set out to make a final end of the Brehon Law of Ireland, "Le Résolution des Justices touchant le Irish Custome de Gavelkind" (Davis' *Reports*, p. 49 *et seq.*) deals with the right of women to hold property under the Brehon law. Complaining, as a defect in the Irish law, of the absence of the feudal law of dower, the justices go on to say: "And where the wives of Irish lords or chieftains claim to have sole property in a certain portion of goods during the coverture, with power to dispose of such goods without the assent of their husbands; it was resolved and declared by all the judges that the property of such goods should be adjudged to be in the husbands and not in the wives as the common law is in such case."

The Re-editing of the Sagas.—The Scandinavian records of the first order are all reduced to writing on the margin between pagan and Christian times. As Christianity impresses itself and writing becomes frequent, they are

edited and enlarged on the stock authority in the same manner as the corresponding English records. I do not think that any interested student of Scandinavian literature, who reads the Nial's Saga, can help seeing that it has been frequently enlarged upon, and probably contains more than one story—several good stories handed down by oral tradition and rolled into one.

M. Bedier, in *Les légendes épiques: Recherches de formation des chansons de geste*, describes the origin of the great French epics of Charlemagne and Roland, William of Orange, etc., as the result of a collaboration by the monasteries of the Via Tolosana with the jongleurs, the monastery supplying the bare Latin annals of the ninth century, and the jongleur the traditional romances which had grown, unreduced to writing, recited from memory for centuries before they were written down. M. Bedier proposes that the epics which treated only of the places on the pilgrim route were advertisements of the monastery, just as some learned Frenchman suggested a few years ago that the *Odyssey* was a sailors' guide to the Mediterranean.

It seems to me hardly necessary to go so far. It would be equally likely that the jongleurs, who were well acquainted with the bare historical facts, which, though they were written down in the monastic annals, passed as well in every generation through the minds of those who never bothered

themselves with records of the monasteries, produced the epics for the monasteries on payment as matter of business without any assistance from the monks themselves, who could only have spoilt the epic by editing it. But if we accept M. Bedier's theory in its entirety, I do not see why it should not be applied to the forms (for instance) of the Magnus Saga of the Orkneys.

First we have an early form, simple, slight, and straightforward, the work of a good skald on a well-known legend. The two later versions show manifest signs of the clerkly editor, who always spoilt the story in his re-editing; and it might well be that these greater exaltations of the saint were composed to work up interest in the saint's vogue of pilgrimage at Kirkwall. It may account for the simplicity and the absence of ecclesiastical matters in the Icelandic Sagas that they had no saints and no place of pilgrimage.

CHAPTER XX

MANUSCRIPTS OF LAWS

Dealing with MSS. of customary laws, we leave behind us once for all in all parts of the islands the language of personal abuse.

But we are met by the same difficulty as

to date, the same accumulation of verbal reports handed down for centuries, the same knowledge that our MS. is a copy and very likely a late copy, and the same certainty that we are dealing with the imperfect and often careless work of anonymous copyists.

The Writing down of Custom.—Custom has no date of origin. In many matters it is instinctive, common to all the human race, as in many customs attending the institution of marriage or the use of land. In other cases it is shaped by local needs, arising from a variety of geographical and other causes. Sometimes it merely points to some historical development of the past, of which it remains as a picturesque survival.

It takes root in religious beliefs, and it grows with social necessities, untouched by false ideas of legislation from without by paid cranks. It grows as it is required to grow.

In all cases it is written only when it is convenient that it should be written, as it may be necessary or desirable for the society to engraft pagan or local or technical custom on the written commands of the Old or New Testament, or to put on record some matter of political or military importance which was the subject of dispute.

At what date any such MS. was first made is a matter for antiquarian research only. It is a matter of indifference to the historical inquirer, except where a written record of some custom may guide us to any inference

for matter of history, as, for example, the bearing of the frequent use of the jury in the *T.A.C.N.* or of the inquest in Scandinavian law proceedings, or the procedure of *cetharaird* and *culaird*, the nearest town lands as the nearest neighbours, in Irish law (*A.L. Irel.*, iii. 119–127),[1] in case of suspected killing; as bearing on the antiquity of the jury in England or elsewhere.

We may take it, I believe, as without exception true that in no case have we any original MS. of ancient law. The only question which affects us in any case is how far the MSS. which we possess represent accurately or at all the laws or customs of society at the time of their asserted date, and in some cases with what objects the law was declared.

Here again we are in danger that wrong impressions of the conditions of society may be given to us through the monastic editing. I am not suggesting blame to the writers or copyists of the early laws. But their very natural desire to raise the tone of the customary law to correspond with the moral sense of the Church inclined them to exalt the authority not only of the Church but of the king, and to attribute to both in past times customary provisions which were inconsistent with what we know of early society. Without discounting this leaning, it is not safe to found his-

[1] *Cf.* F. W. Maitland, *Pleas of the Crown for Gloucestershire*, 3 Hen. III., 1221, pp. xliii–iv.

torical theories of social conditions on these early laws.

Most of the extant MSS. of the early Saxon laws, in the opinion of scholars who judge by the forms and language, date from the middle of the eleventh or from the twelfth century; the so-called laws of Edward the Confessor are edited from a MS. of the fourteenth century, those of William the Conqueror from one of the thirteenth. The laws of Ethelbert, the earliest of the collections in Thorpe, are found only in a MS. of the twelfth century; but the editor notes that the language is more archaic than the Saxon of that date, when it was just becoming a dead language. Only the ecclesiastics concerned themselves with writing, either of laws, charters, or history. Maitland, speaking of the land books or charters, which he says are almost our only evidence for the times before the Conquest, points out that they are almost entirely ecclesiastical. The models for these charters were imported from abroad. They were imitation Roman.

The earliest MSS. of the Welsh laws date from the twelfth century, and most of them are of a very much later date; it is next to impossible for experts to guess how much has been altered or added to the copies, or how far they represent any earlier MS. We come down to the twelfth century, the century which saw general reduction into writing, before we see any general writing of MSS. of customary law.

Occasionally some bit of internal evidence may help us to a guess at the age, as, for instance, where in *A.L.W.*, Dim. II. viii. 27, the law, speaking of sharing of lands by brothers, lays down that where a clerk takes a wife by gift of kindred and has a son by her, and subsequently when a priest has a son by the same woman, they are not to share together, pointing to an earlier date; or where a reference to the kingship may suggest a date, as where *A.L. Irel.*, v. 111, speaking of the king of Ireland, says, "an ollam over kings is the king of Munster," suggesting the time of Brian Boru.

We have no knowledge of any laws of the Scottish kings prior to those attributed to David I., unless we except some archaic fragments called "The Laws of the Brets and Scots," which treat entirely of payments for tort, like all early laws. Laws of the time of David and his successors we know existed, but "of these records," says the preface to *Acts Parl. Sc.*, vol. i., "there is not known to exist prior to the period of the disputed succession and the short reign of John Balliol a single fragment; but of their former existence we have the most undoubted evidence."

The Blood Feud.—All these ancient collections of laws, where they have not been too frequently edited, whether English, Welsh, Scottish, Irish, Norman, or Scandinavian, show us the blood feud in full operation, and the composition in cattle or goods for slaying,

which the indignant English and Scots of the seventeenth century imagined to be an evil habit peculiar to the Irish. It was the normal, unquestioned procedure to which the king or chief assented and in which he took his part. It is interesting to trace its continuance in any of these parts of the islands.

"All laws," say the *Fragmenta Veterum Legum*,[1] "outhir ar mannis law or goddis law. Be the lawe of Gode a heid for a heid, a hand for a hand, an e for an e, a fut for a fut"—the Mosaic law. "Be the law of man for the lyf of a man ix^{xx} (180) ky, for a foot a merk, for a hand as mekill, for a e half a merk, for ane ere as mekill, for a tuth xii pennis etc., etc."

The laws of the Brets and Scots (*Acts Parl. Sc.*, p. 663) adjudge as blood compensation, "Item the cro of a carl is xvi ky."

In order to prevent extortion, when a man had unfortunately killed another, the Assize of David I., c. 7, says that a man appealing another that he has burnt his house or slain any of his kin, and claiming an unreasonable sum, "that is to say for a karl c marks," the defender need only answer for the "resonabil scath" through "the ded of his frend."

The king was a consenting party to these arrangements, taking his fee for a settlement on reasonable terms. By the Assize of William the Lion, chap. 15, where the kin of a man who had suffered under the ordeal of water or

[1] Burton's *History of Scotland*, 2nd edition, p. 64. He refers to *Acts*, i. 375, but I cannot find his reference.

iron take vengeance on the man who caused him to be charged, they are treated as having done it in the king's peace. But if it happen that the king had given his peace "nocht wittand" (*ejus ignorante prosapia*) the kin of him that was slain, "the kyn of him shall take vengeance of him that slew their kyn." They continued to satisfy the blood feud by compensation in the Western Highlands until 1503.

Like provisions will be found in the *Leges Henrici Primi*, *e.g.* chaps. 69–71, etc., and in chap. 36 of the *T.A.C.N.*

The laws of William the Lion, contemporary with Henry II., reflect in many respects the conditions of his tiny kingdom, comprising an overlordship difficult to enforce on distant subjects rather than actual control of the territory to the west and south of Alban proper. They contain provisions intended to check cattle-driving by the men of the north-west. By the laws of Alexander II., chap. 2, provision is made for an inquisition by the justiciar of Lothian about the malefactors in the country, except in Galloway, "quha hes their own speciall and proper lawes."

The "Regiam Majestatem" and Glanville.—The Scots traced back their laws to a code in the Roman style called the "Regiam Majestatem," supposed to have been compiled in the time of David I. But it is practically certain that it is a copy or an imitation made after the Edwardian wars of Glanville's treatise on the

Laws and Customs of England, which was written in the reign of Henry II.

Glanville was one of those extraordinary men who were produced by this age of general awakening. As sheriff of Yorkshire he captured William the Lion in 1174; when Eleanor, Henry's wife, was put under restraint, Glanville was her guardian; he was sent to defeat the Welsh in 1181, and made terms with them in 1185–6, forming a body of light-armed Welshmen to support Henry in his wars in France; he was employed to make a compromise with the monks of Canterbury when they were disputing with Henry over his proposed erection of a near-by monastery to compete with them. When Urban III. sent orders to Henry to stop the work, and the monks began proceedings in the ecclesiastical court, Glanville issued a writ of prohibition in his own court forbidding their proceedings. In his old age he went on the Crusade, and was killed at the siege of Acre.

The two collections differ in that the "Regiam Majestatem" follows the Roman division into four books, while Glanville sets the example to our later writers of separation from the Roman law, treating only of the law as it illustrates the proceedings of the courts. His book gave precedents of the writs issued, ascertaining the procedure and separating England from the Roman law, which was too closely connected with the papal supremacy to suit the English lawyer.

The Scandinavian and Norman Laws.—Unfortunately, almost our only knowledge of Scandinavian customs, whether Norse or Danish, has to be taken from the Sagas and from casual references in books dealing with Norway, Iceland, and the Orkneys. These great bodies of law, both those relating to Iceland and to Norway, remain in the original archaic language, only to be deciphered by experts, awaiting an editor. Considering the great part taken by these northern nations in our history, it is very much to be regretted that so important an aid to history should have been so little explored by English writers. As the laws which governed a great commercial and naval people, with a brilliant literature and a very highly developed system of law, they are infinitely more valuable than the primitive Saxon customs of Wessex, on which so many great English scholars have exercised their minds. We generally leave all research work of this kind to the Germans.

A most interesting collection of ancient custom bearing directly upon and illustrating English law and history is *Le Très Ancien Coutumier de Normandie* (cited in this book as *T.A.C.N.*), edited by E. J. Tardif, 1881. This collection is composed of two distinct bodies of custom at two different dates, having in many instances duplicate chapters treating of the same thing but in different language and in different forms, showing occasionally a variation of the law by time.

For instance, in one of the many notices of the jury in these collections, it is laid down in the first part, chapter xxii., section 1, that if a jury disagree, the agreement of ten or nine would be sufficient. In the second part, chapter lxxvi., a majority of seven out of twelve will be sufficient. In Y.B. 20 Edw. III., vol. ii. p. 554, an assize was brought at Northampton in which eleven recognitors agreed and the twelfth said that he did not and never would agree. And the verdict of the eleven was accepted, and it was awarded that the twelfth should go to prison.

In the MS. of this collection we meet with the same characteristics as in other ancient collections. The text, M. Tardif says, "est conservé dans les copies de beaucoup postérieures de l'époque de son rédaction." There are two texts, one Latin and one French. He dwells on the painful methods by which the editors restored the Latin text, a text, he says, "composé dans les manuscrits d'un certain nombre de fragments de longueur inégale. Les rubriques mises en tête de chacun d'eux sont souvent inexactes." Of the French text he points to "le caractère archaïque de l'écriture, les formes de langage et la persistence de la déclinaison."

The first part of the Latin text he thinks is older than the French text, and he adjudges that it was originally reduced to writing somewhere between 1194 and 1204, probably about 1199–1200, certainly before the seizure of

Normandy by Philip Augustus. The second part of this text he puts towards 1220. The French version he puts between 1248 and 1270. The *T.A.C.N.* undoubtedly embodies very ancient custom, feudal usages being recorded side by side with communal customary law.

As an example of the many interesting passages which bear on the future history of the British Islands, chapter xi. deals with the guardianship of the orphans. Who is to have their care? "Le garderont si cosin? Nanil. Por qoi?" The kinsman might covet the inheritance and kill the minor. They are to be in the guardianship of the person to whom their parent has done homage. They are to be brought up by the lord. "E quant il sont norri es mesons lor segneurs, il sont tenu a servir les plus lealment e a amer les plus en verité. E comment pucent li seigneur haïr ceus que il ont norriz? I les ameront par noreture de pure amor"—a reason which led the English and Scots to destroy by every possible means the fosterage of the Anglo-Irish, which they imagined to be an evil custom belonging exclusively to Erin.

CHAPTER XXI

THE DATE OF THE ANCIENT LAWS OF IRELAND

A GREAT amount of ink has been spilt by loyal men in attack and in defence of different theories about the age of the pamphlets in which are contained the ancient laws of Ireland. Some would put them back to the coming of Patrick, and others forward to the fourteenth century or later. The question is well worth a little consideration, not only on account of the great value of the material itself, but because the controversy is very typical of the handling of such questions.

Sir Henry Maine takes the tenth century as the date of the Book of Aicill (*A.L. Irel.*, vol. iii.), and quotes Mr Whitley Stokes, one of the most eminent and soundest of Celtic scholars, as assigning the Senchus Mor (*A.L. Irel.*, vols. i., ii., and iii.), that is to say, the extant MSS. of it, "upon consideration of its verbal forms," to a date perhaps slightly before the eleventh century.

M. D'Arbois de Jubainville, representing the best French criticism of Irish literature, in his *Résumé d'un cours de droit irlandais*, points out: "Le Senchus Mor est cité dans le Livre des hymnes du collège de la Trinité de Dublin, qui a été écrit vers l'année 1100, et dans le Lebor na-h-Uidre, manuscrit de

la même date qui appartient à l'Académie royale d'Irlande; il est cité dans le glossaire irlandais rédigé par l'évêque Cormac qui mourut en 906. Ses doctrines juridiques se retrouvent dans la collection canonique irlandais qui a été compilée vers l'année 700." He refers still further back to the Confession of St Patrick. With one exception, all the books referred to in the glossary above mentioned are law books.

As to the actual date of the MS., he says: "La rédaction du Senchus Mor, le plus vrai semblable à mon avis est qu'il a été composé vers le huitième siècle." And he points out that the language of the Senchus Mor is quite as archaic as that of the oldest Irish MSS. in existence of the eighth or ninth century.

I would do no more than to put forward various considerations which appear to bear on one side or the other on any question of date, and the conclusions which may be drawn from them.

To repeat what has been said before, we may be sure that the customs recorded existed in all cases as custom for a very long time, probably for many centuries, before they were reduced into writing as law; that, when so written, any stated rule was subject to much modification for local requirements; that the intricacies of the written or unwritten custom were known only to a few experts as an assistance to memory in forming judgments on disputed points, and finally, that it is very

unlikely that any MS. which has come down to us is the original MS., and that there is no evidence that any one, unless it is the Senchus Mor, was of general acceptation in Ireland.

All these guesses as to date of great authorities, based upon language or consideration of verbal forms, apply only to the time when the text of these collections of customary law, which had passed from the memory of one chief or of one Brehon to another, were reduced into writing or were copied from the original MS. to that which has come down to us. We have no data from which to decide how far the various influences which continued to modify the tribal community acted at any given date on the conditions which are declared in any of the customary laws which have come down to us, or in what locality they were received.

It is quite clear, I think, that the collections of the Irish laws, as we have them, were composed of MSS. of widely different dates. For instance, the law of inviolable precincts (*A.L. Irel.*, iv. 227), in which the precinct is measured by spear-casts varying according to rank, the spear to be four feet (twelve fists) between the iron head and the horn on the handle, which does not look very modern, quotes the Senchus Mor as "the great cas of the ancients." To be asked to put a date to such a collection as a whole is as if we were asked to put a date to a collection of English law books comprising *Littleton's Tenures*,

Keble's Reports, *Jones on Bailments*, *Sanders on Warranty*, *Fearne on Contingent Remainders*, and fragments of *Fitzherbert's Abridgement*, if all these had existed in undated MS. only, which had been copied from time to time.

We should have no knowledge as to which edition it was which had survived, or how far the marginal notes of successive commentators or owners of the MSS. had been incorporated in the text in the course of reproduction.[1]

Some of the Irish Tracts would appear to be clearly late from the nature of their contents, as the Tract "Of the Judgment of every Crime" (*A.L. Irel.*, iv. 240), and "The Land is forfeited for Crimes" (*ibid.*, 264), as it appears to regard the compensation in cattle for tort as in the nature of a compromise to avoid punishment by servitude or imprisonment. However, it is quite possible to make too much of this, as, although the editor has translated *cion* crime, the word would seem equally to mean sin or fault, and servitude in the earliest times would follow refusal or inability to pay up for the Brehon's award for a killing.

On the other hand, it would be a great help if we were able to date the Tracts on "Judgments of Co-tenancy" (*ibid.*, 68; *comaithcesa* does not seem to have anything to do with tenancy), as in this treatise, which deals with the very ancient mode of cultivating land by the group family, holding it in common for

[1] As in Stephen's *Blackstone*.

three or four generations, there appear statements of legal doctrines of a most startlingly modern character, such as money penalty for damage by pet animals (p. 115 *et seq.*), references to the property in buildings on hired land (p. 135 *et seq.*), the measurement of the headlands of fields (p. 139), the elaborate definition of boundaries (p. 143 *et seq.*).

In the Book of Aicill (Aicill was the name for the hill of Skreen near Tara, in Meath) the law of hiring chattels, of agency, of contributory negligence, and of partnership is sketched, and the Brehon lays down that the relation of chief and free tribesman is one of contract to be implied in the absence of express words. It is laid down (*A.L. Irel.*, iii. p. 139) that a fine is due for an intention to commit injury which failed.

These equities would be as much or more out of place in the English law of the fourteenth or even of the seventeenth century as in the twelfth. The appearance of such highly developed ideas in works dealing with archaic society and containing the provisions of barbarous custom suggests that the high intellectual development of the Irish lawyer stopped when feudalism, confined within the narrow and repulsive limits of the Mosaic code, laid its heavy hand on the communal society.

The Senchus Mor would appear to be by far the oldest of all the Tracts. With one exception, they consist of a text, generally in very short paragraphs, written in large char-

acters, with wide spaces accompanied by glosses in smaller text in various hands. These glosses are frequently contradictory, and comment on one another, showing sometimes that the glossator could barely make sense of the ancient text. He often gives alternative renderings.

Some Points which bear on the Question of Age.—The archaisms of language or the want of them in the text are not necessarily a test of age, as the verbal forms of the sentence would often be revised by the copyist, who altered them to suit the taste of his own time. In the MS. H. 3–17, p. 157, the statement is made that it was changed from hard original Gaelic and put into fair Gaelic before 1309 by an editor (*A.L. Irel.*, i. p. xxxvi; iii. p. clix, note). In one case the editor points out that the language of the commentary is older than that of the ancient rule.

The commentary was evidently the work of different Brehons at different times and places, each working on a different copy; the text had become very difficult to interpret; handed down to each generation with the glosses of successive Brehons, there were, as it was written, alternative readings and interpolations which might be adopted by later commentators as text.

For instance, in the law of fosterage the commentator sets out the different qualities of clothes for the children of different ranks. Then he goes on: "Another version. No

book mentions a difference of raiment, or that there should be any difference in their clothes at all" (*A.L. Irel.*, ii. p. 147).

I would suggest that no date of the first reduction to writing is possible, because the text and the commentary as we have them may have been committed to writing a hundred times before the particular copy, much altered and added to, has come down to us. Possibly the original text was coeval with the introduction of writing by Roman missionaries.

As we have them, the MSS. are part of those collected from all parts of Ireland in the sixteenth century (*A.L. Irel.*, i. p. xxxiv). The documents which could have disproved any mythical origin were then for the most part in existence to check theories of authorship which were false or exaggerated. We occasionally have a reference to the possession of one of the Tracts with a date. The fragment of the Senchus Mor in Dublin has a memo. written in 1350, "in the writer's own father's book, in the year of the great plague"—a miscellany composed of various fragments, written at different times by different hands. In *A.L. Irel.*, iv., following the commentary on p. 290, there is in the margin of the MS. a note (Dr O'Donovan) by Egan McEgan in 1575, in the Mill of Duniry in County Galway, which says that he wrote the MS. as an improvement on his decayed old book.

There is something intensely pathetic in the despised Irish Brehon, to whom the conqueror

would neither give the benefit of English law nor allow to be ruled by his own customs, but goaded into the life of an outlaw, attempting in the desolation made by the English soldiers to keep alive the light of a legal system full of an unpolished equity which was only condemned because it would not square with the profits of the kingship in the feudal doctrines of the day.

Whatever their date or their origin, the books all speak of other and older law. Referring to a point about injury to roads, the Brehon says (*A.L. Irel.*, iii. p. 307), "Nothing of this is found in any book except the one and twentieth part"; but they are inferred from the law of waifs, and the one and twentieth part is inferred from "the demand of a king for the cutting of his roads." Again, the text quotes (p. 151) the Senchus Mor, the Cain Fuithrime, a law promulgated before 694; (p. 153) "as it is said in Urrhadus law," "the agreement the law speaks of is" (p. 155) when it is said "every debtor his choice."

There are many references to decided cases: *e.g.* vol. i. p. 219, where the first five lines show that the text was referring to a decided case as to false witness; vol. iii. p. 161, "outside" (*i.e.* in another territory) "the assault was committed in this case"; p. 243, what is the difference between this case and that wherein it is said, "Every animal for an offence etc., etc."?

The very short paragraphs and the general

absence of any signs of Roman influence are much in favour of great age. Other arguments bearing on the antiquity of the laws are that in them there is no mention of written contracts, that the meaning of the technical terms had been lost to the commentators, which, with the prodigious memories of those days, meant a vast lapse of time, and possibly the prominence given to bees, though this may easily be exaggerated, as the general use of sugar is as late as the seventeenth century.

When the local custom was reduced into writing, it would be natural for the Brehon to note in the margin any deviations from the general rule, any new points which might arise in practice, or any modification of principle which might suggest itself. But we need not expect to find any Brehon, or his brother of the English Year Books, who might be called upon to deliver a judgment or to argue a case, laying down without the most urgent necessity any principle which might stare him in the face when called upon to give a fresh decision or argument on a seemingly similar set of facts to which the stiff mediæval harshness of the law would not permit it to apply.

In consequence, the lawyers of both countries make use of imaginary cases, such as the damage done by the trespasses of hens or the ordure of hounds (*A.L. Irel.*, iv. pp. 117–123), to be applied afterwards to the cases before them.

The Influence of the Mosaic Laws.—Before leaving this subject of the source of mediæval law, may I be permitted very humbly to suggest that the belief in the absolute verbal inspiration of the Levitical books as dictated by God, the giver of the written law to Moses, the inspiration consisting largely in the writing, was an influence greatly retarding the advance of civilised ideas or scientific thought in law-making, especially in criminal law? The effect was to gauge every detail of social custom as good or bad by the measure of its accord with the primitive customary law of the Israelites, and to put to one side any custom, however equitable, which would not square with such law.

For this reason alone I should be inclined to put the Irish customary law back to a period anterior to the coming of the Roman missionary, and to believe that Patrick or some other missionary, coming in contact with a very highly developed system of ancient law, barbarous to us because it rests on the communal society, had the good sense or was constrained by circumstances to adopt, so far as it did not conflict with his Christian precepts, legal principles of which he saw the equity and the advantage. Augustine, sent to the savage Saxon, had not the same opportunity, even if he had the ability.

The Crithgabhlach and the word "Saxon."—There is one Tract which had been generally accepted as of late origin (*A.L. Irel.*, iv.

p. 298 *et seq.*), a treatise entitled the "Crithgabhlach." It was of sufficient age for the title to have become unintelligible, as appears from the opening sentences, which give alternative explanations of the word.

The Tract concerns itself with the different ranks of society, the kings and chieftains, their privileges and duties, and may be compared with the ancient Book of Rights translated by Dr O'Donovan. It would be of great interest if we could believe that it was even an exaggerated account of real conditions in very early times.

The chief arguments for lateness are that the bishop and not the abbot is said to be of higher authority than the king, an objection of small weight if the Tract was copied under the direct influence of Rome planting dioceses in the place of wandering bishops, who were under the abbots of the tribe, as it appears to have been (Sequel to Crithgabhlach, p. 353). The Roman ecclesiastic would be pretty sure to state a Roman rather than a tribal organisation.

The second point is (p. 335) that it is said that a king may call upon his people "to drive out foreign races, *i.e.* against the Saxons." It is argued that the reference must be made to those times when the rule of the English king had come to be regarded as that of a foreigner, which was not apparently much before the fourteenth century, as the only invasion of which we have any knowledge in earlier times, before the two centuries of attack by the

Norsemen from the ninth century to Clontarf, was a solitary raid in great force of the people of Northumbria, who were otherwise very friendly, in 684, and that the special instance given "against the Saxons" would refer to a race with whom they were constantly in enmity rather than to the single incursion of a race with whom in other respects they were friendly.

I should say that the conclusion to be drawn would be exactly the opposite—that a sudden and most unexpected raid of a hitherto friendly people would impress itself more strongly on the mind than any attempt to drive out in later days a people seated in their midst, with whom their chiefs had intermarried, and of whom many so related to them had suffered for their hostility to the kings of the Saxons in all times.

It is remarkable that, however late in time the copies of these Law Tracts may be, they never give us any clue to their date by any references which could be written of current political troubles, or by any word of abuse of the English ruler. The Crithgabhlach has no commentary, the whole MS. being apparently of one date, which looks as if a late copyist had run text and commentary into one. If so, the original book may very well have treated of the conditions of times long past, and might quite possibly have been written not long after the only attack in early times from the sister island.

The term Saxon might stand for any century, as it is the universal word to express the people of the larger island, whether English or Scots, in all times. Considering the mixed character of the body of the invaders of Ireland in the twelfth century, it is not surprising that the Irish used one word to cover them all—a word used ever since to the present day by the Celtic races both of Ireland and western Scotland to express the people of the east of England and Scotland.

The leaders of the first expedition from Wales in the twelfth century, the Fitzgeralds, FitzStephens, and FitzHenries, were Norman on the father's and Welsh on the mother's side. They may have had English blood among their followers, but probably the majority of them were Flemings recruited from little England beyond Wales. This, I understand, is Mr Orpen's opinion in his edition of "The Song of Dermot and the Earl." Giraldus speaks of them as "the flower of the youth of Wales." He himself was born in Pembrokeshire.

The leader of the second expedition, Strongbow, was a Norman who married an Irishwoman and drew a following from all parts, but especially from Wales.

Henry II., who took the fruits of the work of those who went before him, was a Norman Angevin, whose grandmother was a Saxon with Scottish blood. As we know from the first volume of the *Calendar of Documents*

relating to Ireland, he drew his levies from every county in England as well as from his French provinces. The French writer of "The Song of Dermot and the Earl" speaks of them as the English.

Throughout the Irish Annals they are spoken of as the Saxons or the foreigners, though sometimes the pirates of the east is the term substituted.

Henry appears as the king of the Saxons, Strongbow as the Saxon earl, John as the son of the king of the Saxons (Annals of Loch Cé, 1170, 76, 77, 78, 84, 85, etc., etc.). The Annals of Ulster in 1327 report great war between the king of the Saxons (Edward II.) and his own wife; the son of the king of the Saxons (Lionel, duke of Clarence, son of Edward III.) came into Ireland 1368; William MacWilliam the Saxon (William Burke) died. The Four Masters: 1254, the king of the Saxons (Henry III.) went to Spain on a hosting; 1297, Edward, *i.e.* the king of the Saxons (Edward III.). Annals of Clonmacnois: 1135, Henrich McWittelan, king of France and Saxonie (Henry I.) died, and so on.

As we come down in Irish history we meet with the same use of the word. M. de la Boullaye Le Gouz, travelling in Ireland in the middle of the seventeenth century, says (p. 44) that "as soon as the Irish soldiers learned that I was Frankard they did not molest me in the least, seeing that I was neither Sazanach (Scottish) nor English."

They considered, he says, the English and Scotch as their irreconcilable enemies. Moore, in the nineteenth century, gives us—

"Nor dread that the cold-hearted Saxon will tear
One chord from that harp or one lock from that hair."

"On our side is virtue and Erin,
On theirs is the Saxon and guilt."

To come to our own day, the *Athenæum*, January 13, 1914, in a review of John Mitchell's *Jail Journal*, speaks of him as "dowered with all that racial perversity which is so perplexing to the Saxon"; February 28, "Stories are told which are not quite true—why should they be?—and the Englishman present who asks, Is that story really true? is looked upon as a stupid Saxon who does not understand the amenities of social intercourse."

It was no doubt very difficult for the people of Henry's day to find a common name for the mixed hordes who followed Henry or Strongbow. They called them Saxon, just as the people of the islands called the Scandinavians of the eleventh century Danes, as the eastern races called the Crusaders Franks, and the people of India called the Europeans Feringhees.

Why has the name Saxon stuck to the English ruler? In the first instance, it is an indication of the slight connection of the Normans with Wales or with the west coast. The Irish only knew the first group of the

invaders of England by the name of Saxons; the Norman Conquest had never been brought near enough for them to realise its revolutionary character. To them the castles of the Welsh border were, like Waterford and Wexford, merely points held by alien traders, pirates to be fought and chaffered with; they contrasted the Saxon foreigner with the Scandinavian foreigner, who in Henry's time was a power in their midst. By our dealings with Ireland, by our neglect to enforce impartially the imperial authority, playing into the hands of the alien pope, we have kept up the illusion, with the results of insane and barbarous revolution of irreconcilables in Dublin and importation of German arms by anarchists into Ulster. If the British politician would try to acquaint himself with Irish history and her social institutions of the past it might be possible even now that to the Irish we should cease to be the Saxon. Here at least force is no remedy.

PART IV

CHAPTER XXII

THE USE OF THE MATERIAL

When the original authority, verbal or written, has been discovered, has been compared with other sources, and its place and circumstances of discovery considered, the making of the history book will begin, but not by the historian. In the present condition of historical investigation, it is as much as the compiler of history can do to take a bird's-eye view of the period of which his book treats, a view probably extending over many centuries. He may investigate some of the original records, on which he will put his gloss in print; he may even go so far as to examine them in a foreign or an ancient language; but he is not in the least likely ever to look at a manuscript. That absolutely necessary work is done by other men.

The Archivist.—One is very glad to see that, when a great naval battle occurs, recognition is given here and there to those bravest of men, the firemen of the great ships. They do not see the battle; there is for them none of the triumph, none of the gaiety of war; they do not even know how the battle may be faring; any moment the event of it may send them to sudden death; but down in

the bowels of the ship, unseen and unthought of, often unthanked, they do the drudge-work which drives it towards the enemy and enables their fellows to fight for victory.

The man who corresponds in literature to the fireman of the warship is the archivist. On him rests the work of putting into shape the MS. material which enables the work of writing history to proceed. He is the skilled interpreter of obsolete language, antique writing, technical expressions, occult cues and signs, barbarous spellings; he is the unthanked worker of the engine without which the ship cannot move, the mine-sweeper who makes safe the seas for traffic, the mason who lays the solid foundations for the airy crockets of the historical building.

Like an old doctor who from long and wide experience diagnoses the condition of your unseen body, or an old farmer who does the same by the land, the archivist, tending his engines, may by his experience and learning restore the text where time and misuse and the wearing effects of weather have made it illegible; he may even, like a conjurer, reproduce some ancient word (some rabbit out of a hat, so to speak), which in the damaged condition of the MS. would be guessed by a layman to represent an imaginary ancient form of a modern expression which had no connection with the matter; he will detect forgery; he will correct mistakes made by copyists; he will suggest new readings.

If as well as an archivist he is a man endowed with historical insight and imagination, he will bring to bear on the MS. the political and social views of the age of which it professes to be the expression, and by detecting some reference to such views will fix a possible date for the MS. This labour will be interesting, but before and besides this there is much drudgery of routine work to be done. Let us be thankful that some undiscovered instinct makes men firemen and archivists.

As a general account of the many labours and difficulties which attend the work of the archivist, especially if he looks beyond his MS. to its use for history, there is nothing more instructive than Mr Pike's observations of his experience in the prefaces to the Year Books (R.S.).

The law French and black-letter of the Year Books are not an easy combination to deal with, but it is rather interesting to translate those volumes not yet edited, if one had time. I have not used them for this book, but not for this reason. My reason was that one misses the careful guardianship of Messrs Horwood, Maitland, and Pike when one leaves the edited volumes.

Of the identification of a particular roll, making light of the difficulty, Mr Pike says (12–13 Edw. III., pref.): "There is no escape from the labour of turning over and examining a roll which consisted of 475 skins of parch-

ment, about 33 inches long by 10 broad, closely written" (in law Latin) "on both sides and without any guide to the contents except the names of counties occurring in the margin, and these not in alphabetical or other systematic arrangement." He speaks (18 Edw. III.) of the confusion of titles, endorsement, and arrangement, of the miscellaneous character, as in the MS. of the Irish laws, of the matter. Of one MS. he says (13–14 Edw. III.): "The volume of the Harleian Collection in the British Museum, No. 741, contains other matters besides Year Books, is in several different hands, and is of very unequal merit in the different parts. There were generally many MSS. for each year (17 Edw. III.). In themselves as originals there were many inaccuracies." Mr Pike tells us (18 Edw. III.) that he corrects a non-contemporary MS. "by the aid of the knowledge which is acquired in the correction of the vicious readings of other MSS. and printed texts."

But there was worse to do than the correction of originals. "They must generally," he says, "be copies more or less imperfect, and many of them copies of copies." "The transcribers who multiplied copies were not by any means infallible, and sometimes made many serious mistakes; remarks originally in the margin get into the text, and the abbreviations may be wrongly made, made in accordance with the forms in use in the transcriber's and not in the reporter's time."

The MSS. had been in use for generations before any printed texts were issued, and when printed previous to the nineteenth century, "there was no collation of MSS., no comparison of the reports with the records, no translation, and not even any trustworthy extension of the abbreviations which occur in the original MSS."

This brings us to one of the chief causes of mistake and difficulty, the abbreviations or contractions of words.

The Abbreviations.—When the ancient MSS. are printed for our use the words are generally written at full length. But no ancient MS. was so written. The originals were written in a shorthand which varied in different times and places like the different systems of shorthand now.

Where the writer was following the words of judge or counsel, or was taking down the contents of a letter from dictation, such contractions might be useful; a great majority of them at all times avoided labour and space, as, for instance, qr for quæritur; but a number of them would not appear to have been of any value either for time or space when a MS. was being copied or a history edited or composed in the quiet and leisure of the scriptorium. For instance, ap̃d for apud, sem'l for semel, cū for cum, q^{a} for qua, tab̃las for tabulas, could have saved neither time nor space. The signs would have to be made very carefully, as some of the forms were so much alike that

there was opening for confusion by careless writing for all posterity.

But the occult sign of the copyist may continue to be used for other purposes than convenience. Many people could read a little in those early times, but it is hardly likely that they could read the technical contractions. The use, I think, was one of the difficulties put by the trade union of writers in the way of the unskilled labour which might have interfered with their profession.

The use of these contractions has resulted in making the editing of MSS. very difficult. It often is very difficult to tell which of several forms very much alike and standing for many different words has been used, and to know whether or not the copyist has made a mistake in their use, as, for instance, p̊ post, p̊ pretium, p̃ post or potest, p per, ꝓ pro. Any one of these, if hastily made, or if the writing was bad, or the MS. rubbed or damaged, might be mistaken by a subsequent copyist for another, even if the original copyist had not erred.

Or a later editor, who proposed to restore the text, seeing the mistake, and being unable to make sense, might substitute p° probatio or præpositio, or p^r probabiliter, or p^e prope, or p^i probi, or p̃^l possibilis. The opportunities for error are manifold. And if he became convinced that his new reading was the right one, he would be very likely to make further alterations to make sense.

The fact is that the careless making of abbreviations by copyists, combined with the decay of MSS. and alteration of language, is a chief cause of difficulty in deciphering them.

The following example of these contractions may give some idea of the difficulties to be overcome when they have to be treated on an ancient and timeworn piece of parchment. The instance is taken from the Misæ Rolls of 14 John, on p. 249 of *Documents illustrative of English History in the Thirteenth and Fourteenth Centuries*, selected from the Records of the Department of the Queen's Remembrancer of the Exchequer, edited by Sir Henry Cole (Record Commission, 1844). This has been partly translated by the editor (Preface, p. ix).

Đ M3cur̃ in festo Sc̃i Steph̃i ibid̃
Die Mercurii in festo Sancti Stephani ibidem

Wilekiñ de Marisc̃ ad runcinū emendū de dono
Wilekino de Marisco ad runcinum emendum de dono

ii m̃ p R̈ Ibid̃ Arnaldo nūcio
duas marcas per Regem Ibidem Arnaldo nuncio

Burgensiū de Rup̃lla eunt̃ in p̃riam suam de
Burgensium de Rupella euntem in patriam suam de

dono i m̃ p R̈ Ibī̃d Monialib3 de
dono unam marcam per Regem Ibidem Monialibus de

Cestrunt̃ de dono i m̃ p R̈ Ibī̃d
Cestrunt' de dono unam marcam per Regem Ibidem

℔ vi bisanciis emptis ℔ oblõe dñi Rẽg
pro sex bisanciis emptis pro oblatione domini Regis

fc̃a ad relliquias a p̃d Radin̄g die Dn̄ica
facta ad relliquias apud Radingam die Dominica

p̃x̃ª post festum Om̃ium Sc̃oḇ xi
proxima post festum Omnium Sanctorum undecim

s̄ vi d̄ Đ Jovis in festo Sc̃i Joh̃
solidos sex denarios die Jovis in festo Sancti Johannis

Evan̄gle a p̃ Eiswel̃l in ludo Dn̄i R̄eg ad
Evangelisti apud Eiswell' in ludo Domini Regis ad

taḇlas q̄n̄ lusit cū Briañ̄ de Insul̃ v
tabulas quando lusit cum Briano de Insula quinque

s.
solidos.

Notice the difference in the signs for Regis and Regem, and the different apuds before Rading and before Eiswell.

Translation.—"On Wednesday the feast of St Stephen at the same place to Wilekin de Marisco to buy a horse a gift of two marks from the king. At the same place to Arnold the emissary of the burgesses of Rochelle going to his own country a gift of one mark from the king. At the same place to the nuns of Cheshunt a gift of one mark from the king. At the same place for six byzants bought for the oblation of the lord king made before the relics at Reading on the Sunday next after the Feast of All Saints eleven shillings and sixpence. On Tuesday the Feast of St John the Evangelist at Eiswell for the (losses at) play of the lord king at tables when he played with Brian de Lisle five shillings."

The account might be analysed as: War Department for a horse, £1, 6s. 8d.; Foreign Office to messenger, 13s. 4d.; Ecclesiastical Commissioners, grants in aid of the Church, £1, 4s. 10d.; privy purse, 5s.

The contractions of the native languages were even worse. Charles O'Conor, a very learned Irishman, writing to the Chevalier O'Gorman in 1781–3 (Introduction to *Four Masters*, pp. xxxvi–vii) says: "I request that you will make your scribe to confine himself to an accurate facsimile, the contractions being singularly uncommon and explainable only by readers long and well acquainted with our writings." Any deviation, he says, would render the text unintelligible. "But the worst of it is I doubt if you have a man in France or in Ireland who could decipher the contractions. In my province of Connaught I know of none, myself excepted, who can read these Annals."

The editor of the *Four Masters* (p. xxxi), speaking of the grandson of this man, Dr O'Conor, to whom Ireland is much indebted as one of the first to preserve the ancient Annals, says: "It is generally acknowledged that Dr O'Conor has fallen into many serious mistakes not only in the translation but also in deciphering the contractions of the autograph MS. of the *Four Masters*."

Translation.—When, however, this difficulty is overcome, there is another very formidable one to be faced in the decay of knowledge

concerning the ancient languages in which valuable records survive, archaic forms of modern languages, Saxon, Irish, Welsh, French, and Scandinavian, which have been shouldered out of the way for the more generally used instrument of monastic Latin. Apart from this medium of expression, the perspective of history has suffered much distortion from the want of an elementary knowledge by authors of the languages in which the records have been written.

As an example, Palgrave (*Antient Calendars and Inventories*, vol. i.) tells us that among the books in the Royal Treasury was one written "in a language unknown to the English," beginning, "Edmygaro douit duyrmyd Dinas." Two learned Cymric antiquaries translated it; the first read it, Edmygar I will honour, Ddovydd the Deity, dwyrinnydd the upholder, Dinas of the city; the second made it, Edmygau solemnity, douit that overspreads, du gloom, yn opposite, myd a circular enclosed Dinas city.

The Irish language had fallen so entirely into disuse that the ancient MSS. were barely decipherable by the experts in the eighteenth century. It would hardly, I think, be too much to say that a great part of our political difficulties with Ireland have been due to the fact that her early history and laws were written in a language which, since the seventeenth century, was in process of decay, and that men of letters took no pains to make

themselves acquainted at first hand either with language or literature. The histories continued to be written both from Roman Catholic and Protestant standpoints, but without any knowledge of the social or political history of the times preceding religious disputes from original sources.

Writing of the unpublished condition of Irish MSS., Mr James Hardiman, a learned antiquary, says in 1843 (*Tracts relating to Ireland*, Irish Archæol. Soc., vol. ii.): "It is not therefore boldness or presumption to say that those writers who have hitherto treated of the affairs of Ireland were in a state of positive though not of invincible ignorance of the sources from which alone they could have drawn the most instructive portion of their labours. . . . Events they have narrated with sufficient accuracy as to time, space, and circumstance; but not so the causes to which those events might have been placed."

It is generally admitted that the translation of the Brehon laws would be the better for revision.

It would certainly, if revised, assist us to a clearer insight into social conditions; for instance, the use by the editors of the word tenant, tenancy, tenure as applied to cattle mortgages is entirely misleading. The translation of *A.L. Irel.*, vol. ii. p. 194, begins, "Cain law of saer stock tenure." The Irish is "Cain tsaorraith." *Raith* has no connection whatever with tenure.

If one turns to the glossary in vol. vi., one finds *raith* = surety, security. But under *rath* this passage is quoted, and *rath* is said to be equivalent to stock. Then under *saer* it says *saer rath*, the law relating to free tenants, which is what you might expect from a glossary.

Ireland has suffered more than the other parts of the islands from the difficulty of editing her ancient tongue. The Irish language, like the Greek, has aspirate signs and accents, which are an added difficulty and source of error, especially as the language remained so long uncultivated that, when the attempt was made to decipher the old records, they were all but unintelligible even to the best archivists.

Being Ireland, less money and less care have been bestowed by the Government on their archives. The present withdrawal of the grant for the study of Celtic will be a hindrance to loyal Irish scholars, but none to the disloyal, except to give them a more secret means of communication among themselves.

Sir J. T. Gilbert, in pamphlets called *Record Revelations*, in 1863–4, exposes the treatment of the Irish records, and gives examples of the many mistakes of translation and editing made by the editors of the Calendar of Patent and Close Rolls of Ireland, from want of knowledge of the language, the true Irish archivists being ignored.

This is their very lucid explanation of the

entertainment of a chief and his following, called, in the language of the days of the Rolls, "coshering" or "coshery": "cois-a-re, cess or rent for the king received by him by receiving him into coshery"—which is a very clear definition. "Colp," a Gaelic word in common use to express the number of sheep that can graze on a certain extent of pasturage, is explained as a wax candle—"colpo a copo de cere." "Cahernamarte" *i.e.* Cathair-na-Mart, the stone fort of the beeves, is cleverly turned into the equivalent of Cahernemort, the city of the dead.

In the monastic Latin the same errors occur. In the Patent and Close Rolls above mentioned, "de quolibet bolte de Eylesham" (*i.e.* bolt of stuff from Eylesham in Norfolk) appears as "every bolt of isinglass"; "lanu de quolibet capite syndonis" becomes yarn; "fraiello de batteria" (a basket of kitchen ware, says Gilbert) becomes a frail of butter; "de qualibet sella," for every saddle, becomes for every seal, and "de omnibus generibus de averio ponderis," for all kinds of avoir de pois or valuable goods weighed by the pound, is turned into all kinds of haberdashery. Every crannoch of malt ("crannaco brasiæ") becomes every load of hay.

But it is not necessary to take Latin instances from Ireland. In Tacitus, *Germania*, chap. xvi., the cultivation of the arable lands is said to have been "per vicos," by townships, or is it "per vices," alternately? Some editors

say the one, some the other. There is no chance of settling the question from an original MS. Either will make equally good sense, but a different effect. New editions give various meanings and draw different conclusions and settle nothing.

Monastic Latin is a study in itself. "Le Latin des 9e, 10e et 11e siècles, surtout le Latin des chartes et des diplômes, n'a rien de commun que le nom avec le Latin de Cicéron et de Tite-Live."

As an example of the French of charters, the Bond of Allegiance to Edward I., printed in Sir J. H. Ramsay's *Bamff Charters*, may be referred to.

Minor Difficulties.—When the MS. has been deciphered and translated, the difficulties are by no means surmounted. For one thing, different peoples began the year at different times, and not only so, but dated their calendar from a different date of origin. Every date in a document has to be most closely scrutinised and compared with those of other documents at the same time. Where during long periods of years the reckonings of the Northumbrian chroniclers differ from those of the south by two whole years, in every date Mr Kemble concludes that the Northumbrians were in the right.

The spelling was phonetic, and barbarous in the extreme, growing worse rather than better in the later times. And the interchange of letters helped the confusion. Mr

Pike (16 Edw. III., vol. ii. p. 513, note 2) instances a difficulty occasioned by the interchange of *u* and *v*. There was a Lord Chancellor in Edward's time whose name has always been quoted as Par*n*ing. Mr Pike shows that it was Par*v*ing, by it being here spelt Par*w*yng for Par*u*ing.

The imminent perils of forgery present a perpetual difficulty. The archivist must consider all the accompanying circumstances which may point to spuriousness, such as anachronisms, parties being named who are not contemporary, or the introduction of corroborative circumstances, as people would not be likely to insert facts which everyone knew.

When we have considered all the pitfalls, all the dangers and difficulties which beset the expert who remakes and translates the ancient MS., we are in no position to throw stones at the men of a century or two ago who failed in absolute accuracy or in phenomenal perception. We have all the advantages of their mistakes; the interest which they created in the ancient MSS. has enured to our benefit; we have photography and its allied arts to help us; we have better housing—read Mr Pike's Preface to 18 Edw. III. on the many journeys taken by the Rolls of Court; many new MSS. have been made which assist us in the knowledge of the old MSS. Many new workers have come into the field; the older men are not afraid of

translations and other helps to enlarge knowledge; we have better glossaries and better mechanical appliances; our improvements, where they exist, are made upon the foundations of the former men. They acted as the pioneers who cleared the unbroken woods with a narrow strip of iron and an ox. We can plough deeper, and break the ground better, and have larger crops; but we need not think ourselves so much the better men on that account.

CHAPTER XXIII

MODERN USE

The Seventeenth-Century Antiquarians.—Passing by the destruction of ancient documents, both of Scotland and Ireland, which seems to have taken place on a large scale from the thirteenth century onwards, and the perils of forgery and re-editing, we come to another danger, the perils from the labours of the seventeenth- (and, we may add, the sixteenth-) century antiquarians, who held the same position with regard to ancient MSS. as Horace Walpole and his time did to Gothic architecture.

An age that was the creator of new conceptions of beauty, that enjoyed new romances of daring adventure, new letters, new music,

new ballads, new faiths, new worlds discovered, could hardly be expected to concern itself seriously with musty records, the parchments of a time to which they felt themselves so vastly superior. Their intellectual trunk-hose were a world too wide for the shrunk shanks of the centuries left behind them. Like all creative ages, they were hopelessly uncritical, enjoying a mass of undigested information as a plaything for amusement and self-gratification. As a pleasure they worked, and they worked hard, employing their research on past history and old records. You may read the results in Spenser's *View of Ireland* and Leland and Bale's editing of Walter of Coventry.

They did good work in this, that they collected a vast amount of material for investigation and critical examination. The worship of the Saxon Chronicle dates from that time; Lambarde edits it in 1568, Wheelock in 1644. Magna Charta becomes for political purposes our palladium of liberty as directed against the predecessor of Charles. It became the fashion to collect books and to read; even Mr Pepys has to have an "alphabet" of his books. But the times had gone by too far. The old conditions of society were forgotten; the conclusions which men drew from their investigation of the past were based on artificial theories, political and social, of their own times which had no connection with the former life. Their labours waited for a century and a half before they bore any fruit of value.

The Modern Historian.—In the latter half of the nineteenth century there was a very brilliant opportunity for a rapid increase of intimate knowledge of early British history. During the first half of the century, following the Napoleonic wars and the reform agitation of the thirties, the excavation, arrangement, translation, and editing of material had gone on in every direction, in records of ancient, mediæval, and modern history, in law, in Church history, in letters and all kinds of documents, often in the hands of very able editors, men with their heart in the work of clearing ground unthanked for those who were to come after.

It was an age of really popular education, encouraging all that was best in men, before the influence of 1870 stopped the drawing out of mental powers and substituted the pouring in of accumulated and undigested facts. It must have looked in those days as if the mean jealousies of the different parts of the islands would be put to one side, and that all would look at past story through the same strong telescope. Many men, such as Hardy, Skene, Petrie, O'Donovan, O'Curry, Kemble, Palgrave, Aneurin Owen, Gilbert, and Thorpe, were working on the new material, fashioning it into shape for the popular historian.

Most unhappily, many circumstances intervened to prevent the fruition of the work of the men who had provided it.

The political temper of the times was against any accurate presentation of facts.

After the Reform Bill of 1832, the Whigs who were the writers of past history rewrote it in the light of their political theories, and, following the bias of the seventeenth century, they laid for us the foundation of that false use of the monastic distortions of the twelfth century which, using the successive evidences of historical tradition to depress the kingship, and with it the Church, has, as democracy has widened, become a habit even with Church historians.

Then, unfortunately, most of the histories were histories of England. One great judicial historian, Burton, arose for Scotland; and the writers of history in Ireland, both Protestant and Roman Catholic, made full use of historical facts to put forward their views of religion,[1] with no outlook towards the early Irish history before religion was superadded to the original cause of trouble.

But none of the men who wrote of English history made use of the new material to carry their action over the border north or west, unless to illustrate some great superiority of the Anglo-Saxon over the peoples of the rest of the islands; and as a result the histories of the other parts reflected the reverse of the English view, jealous, envious, and critical at every point of contact with the contemptuous superior, but not in the least constructive of their own past histories, except as they were affected by England.

[1] There is one absolutely impartial history of Ireland, by John O'Driscoll, probably out of print.

Another influence leading to the same result was the prevalence of the idea that the only good things of this world, whatever might happen in the next, came through the Anglo-Saxon from Germany. As a result the settlement of England by the "Anglo-Saxon" became the world of story round which the twinkling stars of other worlds revolved. Speaking of the unknown author of the *Mirror of Justice*, Mr Maitland in his preface quotes him as saying, "We must go back to the coming of the English." "Further back than that," says the editor, "we need not go. He is as ardent a Teutonist as Mr Freeman; more ardent, for of the Norman Conquest he says no word. Of British, of Scandinavian, of French elements in our history, he will know nothing; the feudal arrangement of society is for him a sacred, primeval, unalterable arrangement." The passage is a good description of the narrative histories of the last half of the nineteenth century on which our generation was fed. Dr Franck Bright, in his *History of England*, a capital compilation of facts, thinks so little of the value of the four hundred years of Roman civilisation that he ignores it altogether and begins with the invasions of the savage slave-traders from the Elbe and Weser.

Then, lastly, the very evil influence of decadent political ideas, the belief that past history can only be read to advantage in the light of the view that freedom is the power to

refuse the rights of a freeman the right to contribute towards the needs of the State goods or personal service, destroyed all the little interest in early history which the industry of men such as Mr Freeman had created. Every act of a king or minister, in days when they were responsible for all acts or omissions, was judged by its bearing on what is called constitutional history.

To give one instance of the result of such a theory in an otherwise admirable history, I quote from a modern *Advanced History of England.* It is evidently a work widely used, as the quotation is from p. 165 of the fifth edition, 1901. In 1198 Richard I. required means to repulse the attacks of Philip Augustus on Normandy. He asked his barons for means to pay 300 knights; but Bishop Hugh of Lincoln objected to paying for soldiers abroad, and being backed by the bishop of Salisbury, the king's request was refused. The writer's comment is: "This successful resistance to a scheme of taxation marks a further advance in constitutional progress"—why, it is not easy to see.

When in the next reign such methods lead to the loss of Normandy, it is safe to follow the monastic chronicler and put the blame on King John. In 1214, says Walter of Coventry, some of the barons of the north refuse to pay scutage or to go with John to Poitou, "dicentes se propter terras quas in Anglia tenent non debere regem extra regnum sequi nec ipsum

euntem scutagio juvare." As a result John lost Normandy, The same point was raised in 1225, the chronicler remarking that it was a chief cause of wars against John. This "successful resistance to a scheme of taxation" lost us later our American colonies. It may lose us our national existence.

Throughout this most depressing period of the nineteenth century, past history was written almost solely from the standpoint of a national development which looked only to a time of luxuriant happiness when "the fair white-winged peacemakers" would fly over the world carrying the raw cotton to Manchester, and taking back the manufactured goods to the other peoples, the millennium being reached when all the working men would have a vote.

Although the more extended histories dealing with later times kept alive a certain amount of general interest, and a few men[1] deal brilliantly with short special periods, the effect of the "constitutional history" doctrine has been that narrative history, at least for educational purposes, has died a painful death, and that the materials collected for its illustration have been practically thrown away.

But the deadening of the interest in narrative history may have had the effect of giving an impetus to the study of another branch

[1] E.g. *Ireland under the Normans*; *The Song of Dermot and the Earl*, by G. H. Orpen; *The Reign of Henry VII.*, by A. F. Pollard; *The Popish Plot*, by John Pollock; *A Short History of Ireland to James I.*, by Joyce, etc., etc.

of history, the history of social institutions, bringing to the study of this subject the labours of writers who might otherwise have been diverted to the more interesting task of telling a story. Not only has much laborious work been done in all quarters over old records, as, for instance, in the editing of the records of the Orkneys and Shetlands by Messrs A. Goudie, J. Storer Clouston, and A. W. Johnston, or of the English counties by members of various societies (*e.g.* Records of Somerset Quarter Sessions, edited by Rev. E. H. Bates Harbin, 1907, 1908, 1912), but, following Maine de Lavaleye and other earlier authorities, Maitland, Skene, and O'Curry of past writers, and many very learned and brilliant living men, have illuminated dark corners of knowledge.

But here again their labours run the risk of being merely local and antiquarian. The greater number of such men devote themselves to the conditions under feudalism, dealing only with the English portions of the islands, and ignoring the social features of tribal or communal society in the other parts. This is a small matter by the side of the chief obstacle to the diffusion of knowledge, the wide-spread ignorance of any of the real facts of narrative history by the mass of readers, which must make any attempt to assimilate the learning on past institutions an appalling effort. It must be very hard for a university student, brought up on constitutional history, to make

anything of the information lavishly poured out in the chapter on franchises in Professor Vinogradoff's *English Society in the Eleventh Century*. Constitutional history would give him no idea that there were such things as franchises. Some elementary knowledge and some imaginative faculty are necessary before one can digest such writing.

We want a new elementary history of the British Islands which can forget that there was ever such a thing as a Parliament—a historian who will try to tell a straightforward tale without introducing the political atmosphere of his own day.

Perhaps a woman might do it, for women have shown of recent years a considerable capacity for writing good history. Miss Lawless has shown that an account of Ireland may be written which is impartial; Miss Hull, that women can bring to history the necessary imagination without loss of accuracy; Miss Bateson, that learned editing of difficult records need not of necessity be dull. Miss Norgate has continued narrative history in England; Miss Zimmern, history of commerce; Miss Bazeley creates interest in the cinder-heaps of the Forest of Dean, and so forth.[1]

[1] *Ireland*, by Emily Lawless; *The Northmen in Britain*, by Eleanor Hull; *Borough Customals*, by Mary Bateson (Selden Soc.); *England under the Angevin Kings*, by Kate Norgate; *The Hansa Towns*, by Helen Zimmern; *The Forest of Dean in its Relations with the Crown in the Twelfth and Thirteenth Centuries*, by Margaret L. Bazeley.

If no man is ready for the work, may not one of such women write a new elementary history of the British Islands as a whole, apart from politics, for the use of the illiterate professional classes and others? Before the labours of the men who write at length with profuse learning on abstruse subjects will meet with any intelligent appreciation, it is necessary that such a history should be written, and it is also necessary for the furtherance of our political ideals.

CHAPTER XXIV

CONCLUSION. A FEW OBSERVATIONS AND SUGGESTIONS

I END by making a few suggestions as to historical study on which others may pass criticism.

The value of a trained memory, and the extraordinary powers of the memory when trained, are not sufficiently appreciated in our day. Our education, even in the mathematics, is carried on so entirely by the use of books and paper that little encouragement is given to the balancing of facts or figures accumulated in the mind, leading to a mental indigestion of food which may be followed by terrible results.

The value of the training of the memory does not merely consist in the housing of the material; the process of digestion is of far greater importance, and one which has a far more enduring effect than the mere acceptance of facts by reading. It is this which gives the great value to the training of the memory; the man can turn over in his mind the facts which he has remembered; they are his own and not another's; he can consider for himself their explanation; he can see them in their full bearing, and not merely as the written, perhaps casual, opinion of one party, to whose work, if he has relied on the writing, he must refer before he can so consider them; and by the more frequent use of his memory he can strengthen the powers of observation, the accuracy of thought, the grasp in the mind of the bearing of the facts digested.

This is an especially valuable assistance in the study of history, in which there may be a great mass of facts leading in many different directions, resting sometimes on very questionable authority, useless for any purpose unless the conclusions drawn from them can be formulated by weighing in the mind their different aspects.

At present we are so entirely given up to diffuse reading, for the most part foolish reading and vain repetitions, that very few men indeed, I believe, ever think out any political or historical question for themselves. They read either for the one or the other

what someone else has written about it, taking the written opinions of men who, like the monks of past times, were frequently anonymous, of whom they know nothing unless it is the name, men who very likely have not given any more consideration to the subject than the reader, or have merely compiled their facts from others who went before them. This want of mental responsibility for one's opinions is not only a pressing danger in our political life, but it is a symptom of the decay of a language and of our civilisation, a decay which comes when men cease to think for themselves.

I would suggest that geography is not sufficiently taught or studied. Without it, most facts of history are meaningless, and many lead to wrong conclusions. All histories should be accompanied by maps to illustrate the movements of peoples, the military campaigns, and the limits of the jurisdictions. I do not mean by maps those pictures in which all the Teutons are on one side of a painted line and all the Celts on the other, but maps showing the watercourses—the course, for instance, of the Clyde and the Forth—and the mountain ranges which form watersheds, such as the Grampians. Scottish history, even if it may satisfy the pride of the Lowlander, is imperfect and misleading without such assistance. The military movements of former times, the great march of William I. from the north into Wales, the movements of the armies in the

barons' wars of the fourteenth to the seventeenth centuries, cannot be appreciated at all without some knowledge of the obstacles, such as swamps, rivers, and mountains, which confronted men in days when journeys were made on foot or on horseback, to say nothing of the movements of commerce which were dependent on them.

It would not be at all a bad thing if very elementary facts of geological formation assisted the knowledge of geography. It is especially of force in the history of Scotland and Ireland. If some such maps as those in Mr Edward Hull's *Physical Geography and Geology of Ireland* were inserted in histories, it might be easier to understand why the Pale remained where it was or shrank in one direction rather than another; why corn-growing Meath was so often raided on all sides; why Connaught only came under English rule in the reign of Elizabeth; it might even help to show why the people of East Ulster, apart from any matter of religion, have always separated themselves from the rest of Ireland and joined their own people in Western Scotland.

I would urge that, so far as may be possible, every reader of history should be instructed in what is known about the writers on whom he is to rely for facts, not only those who lived at the time, but those who followed them. It should be impressed on him that, although Brompton and such authorities as that "very

curious specimen of the apocrypha of the law," the *Mirror of Justice*, are discredited as authorities in these more critical times, it was not always so, and that many errors have passed from their pages into credited works now in use of which he must be wary. His attention should be called to the difficulty attendant on the obtaining of correct information in those days of slow motion, and the certainty that any story must have passed through many mouths before the original oral tradition dropped into the written form in the MS. from which the history is taken. It is not the amount of fact, but the conclusion which can safely be drawn from it, which is of importance.

Everyone who takes up history as a serious study ought to make himself acquainted with at least one of the great languages of the world, Latin, Greek, or a modern tongue, and one of the historical languages of the islands as well, Saxon or Irish or French or Welsh or Norwegian or Danish, with a view to applying the knowledge to the unlocking of the ancient dialects in which so much of our history is written. There are few workers and a large field to cover. The knowledge of languages so acquired could be used in addition in furtherance of commerce or even in the Foreign Office. Our ignorance of languages handicaps our people in every relation with other peoples.

Very few people ever get any further in the reading of history than the middle of the

seventeenth century. Most do not get so far. All the great deeds of our navy, all our greatness and good luck in expansion which has followed, all the history of the routes which commerce has taken in the past and may leave in the future, are hidden from the man who is being perpetually told by the politician that he is the ruler of a great Empire. Such study would be of immense value if an early and a late period (the times of Henry II. and Anne, for instance) were read together and contrasted.

A reference to the rise of the Italian republics and the history and persecution of the Jews might lead to a sympathetic understanding of that most necessary study for the historian—the sources of national wealth, and the changes in national finance. In this connection, some of the accounts of the king's household in times past would put a truer light on his position as sole manager of popular affairs and sole leader and guardian of the State, revealing an interesting development which could be traced down to our own time.

A study of legal matters would show the limitations to the king's authority by custom and the law courts, and their bearings on revolutions. It would show the student that the liberty which we have had has been won not half so much by fighting or by talking in Parliament as by judicial decision at the hands of judges who dared, in days of great difficulty

and under grievous temptation, to stand up for the only true liberty—the right to a fair trial before an impartial bench.

I urge that, when reading and when writing history of the past, we should cultivate humility in comparing ourselves with the men and women who fought and suffered in past times. It is doubtful if in any respect we have made any advance beyond the conditions of the Middle Ages, except in the one great matter of medical and mechanical appliances; we can move about the world much faster than was thought to be possible less than a century ago, and we can send thoughts and facts and news round the world in a few minutes. But few of us have the hardy frames of the men of the twelfth century; few of us, like the seventeenth-century lawyer, can rise to read at four in the morning. We have easier life, greater freedom from plague, artificial means of prolonging days; morally or mentally, it is doubtful if there is any change, at least for the better. It is easy to sneer at the great Duns Scotus, and to babble about angels dancing on the point of a needle. How many of the best minds of our day can command the clarity of expression, the logical thought, the reserve in use of forcible language, the bold reverence in treatment of the subject, of the author of *Cur Deus Homo*?

A just appreciation of the facts of past history and of their bearing on the conditions of the present will depend on our getting rid

of the aggravated assumption of superiority over all former times.

I have spoken throughout this book of the evil to historical study of accepting the monastic statements of the Anglo-Roman chroniclers without checking them and distrusting them. But I protest against the possible suggestion that anything I have said should be taken as reflecting on Christ's Holy Catholic Church, more especially that Reformed branch of it established in this kingdom, which represents to me in many respects the highest teaching of Christian morals to be found in the world.

It is the fashion for the ignorant to sneer at the National Church and to attribute to her neglect any lack of faith and any decay of morals. The National Church is a human institution, and has all the defects of a Catholic Church which holds the mean between the two extremes. Her faults and failings are ours, and at her best she stands for all that is best in us which we have learnt from her.

We cannot judge the mediæval Church by the standards of our own time, but we owe it nearly all the advance in civilisation which we have made. In a time when unceasing war was the normal condition of Europe, the Church always directed its efforts to widen the short intervals of peace; it enforced the sanctity of oaths and contracts, using all the penalties of the Church to safeguard them. It is to the unceasing efforts of the Church

that we owe any progress that we have made in this direction, and it would be the grossest ingratitude not to acknowledge her overpowering influence in awakening our moral sense, as well as our debt to her for progress in the arts and sciences.

But for that very reason the monastic writers—a class apart in the land, responsible only to an alien authority, judging all men's actions by the test of unquestioned obedience to the Roman discipline which was their strength, to the only power which intended a moral sense—are most unsafe and partial authorities to follow without a certain countercheck either for estimates of personal character, which they must always have judged by the relations to the Church, or for historical facts in matters where the king or other layman was in conflict with the views of the Church.

This becomes the more marked when the monasteries grow to be immensely wealthy and very worldly, when the monk, or more often the layman, with no more religion than a pheasant, masquerading under the tonsure as a religious, writes his accounts of the affairs of Church and Court from the idle gossip which he picked up in the streets or the antechamber.

In the hands of our modern historians, especially in the hands of churchmen, these accounts become doubly unsafe. It is due to the higher moral sense impressed by the great National Church that these most impartial

writers are only too apt to accept as truthful the monk's stories as the account of a religious man, without considering the strong bias under which they were written; whereas, for the reasons just given, though they are very necessary and in fact indispensable, it is not safe to trust the monk by himself without the exercise of common sense on the conditions under which he wrote, aided by every available check from without. Nothing is gained to religion or to morals by basing history on doubtful presentation of facts.

There is no truth in the idea that history can be made to revolve round any one personality or can be written from one side only. There is a plaintiff and defendant in every cause, and neither holds the whole of the truth. If you take the monastic view that one man in any age controlled affairs because he was unutterably bad or impossibly saintly, you lose sight of the causes, spiritual, physical, and commercial, which regulated the happenings of history.

The danger is still with us. It is not unlikely that in later days the history of these stirring times may be written round the personality of some one man.

Moreover, in early days, owing to poor means of communication, the single person, even if most exalted, was of far less importance than he now may be. The spiritual call of life which leads to events never follows the moral character of any one man. To take

such a position is to lose sight of all the lessons which history can teach us.

What can history teach us? As a training for the mechanical powers of the mind, for improving the qualities which require rigidity and narrowness of view, for strengthening the memory, for encouraging accuracy or concentration of thought, it is surely inferior to languages and mathematics. But in another direction, away from the mechanical operations of the intellect, it may have very great value. It can assist in forming a right judgment on matters of national importance about which we may learn lessons from the past, and it can encourage a broad and temperate outlook upon contemporary affairs. It can do more than this; if the history is read with a definite end in view, if the facts put before the reader be real facts, and he be warned against the distorted vision which is sure to accompany every contemporary presentation, the study of past history can lead the mind into a higher sphere, can bring it to a contemplation of hopes and plans for future social advantage, unselfish conceptions of human progress, dreams of a better and happier world which may unite all the jarring atoms in harmony.

Through long centuries history is identical with poetry; it hands down to us the subjects of poetry, the greatest actions of the bravest men, the purest thoughts of the greatest minds. It is closely bound up with ethics; it shows us the persistent efforts made in every age by

men of action and reflection to restrict the evils which afflict society; it is the compendium of many books, of many ages, from which can be drawn out of the experience of the past an unselfish ideal of social life, racial, national, and imperial—a united people with a definite social aim for which they are willing to make great sacrifice, a nation not ashamed to own to past faults strenuously urging forward its aims at social betterment regardless of the cost to itself, and an empire resting on the contentment of its varied races. And it can be an equally evil influence if it is falsely taught in hatred and suspicion.

At present we have no historical or national ideal whatsoever, and apparently no voice through which an ideal may speak to us.

. . . . . .

I make no excuse for my views. As some great writer has said, there is no harm in a false theory, because men set to work at once to refute it: it is the false presentation of fact only which matters.

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